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Alex. D. Hanson

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

SOUTH CAROLINA.

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FROM NOVEMBER, 1839, TO MAY, 1840, BOTH INCLUSIVE:

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L. CHEVES, JR.

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CASES AT LAW,
ARGUED AND DETERMINED IN
THE COURT OF APPEALS
OF
SOUTH CAROLINA,
AT
COLUMBIA, FALL TERM 1839.

JUDGES PRESENT.

HON. RICHARD GANTT,
HON. JOHN S. RICHARDSON,
HON. J. B. O'NEALL,
HON. B. J. EARLE,
HON. J. J. EVANS,
HON. A. P. BUTLER.

Nathaniel Sims vs. Davis & Tygart.

The mere use of a way over uninclosed land, will never ripen into a presumption of right; but a prescription might have grown upon implied assertions of the right on the one part or admissions on the other.

The contrary opinion in *Roland vs. Wolfe*, (1 Bailey R. 56,) and in *Garret vs. McKee*, (1 Bailey R. 341) reviewed.

Before EVANS, J. at Union, Spring Term, 1839.

This was an action on the case for obstructing the plaintiff's private way from his house to a public road. The way was through the uninclosed ground of Davis, who caused his overseer, Tygart, to inclose the land and make a way around it. The other points of fact on which the decision of the Court rested are fully set out in the subjoined opinion from the

Bench. The jury found for the plaintiff; upon which the defendant appealed:

Because the court ought to have ordered a nonsuit, on the motion of the defendant's counsel; the evidence being insufficient in law to sustain the action.

Curia, per EVANS, J. The plaintiff claimed a right of way over the defendant's land, along an old road which had existed for many years. The road was called the Vincent road, but when, or by whom, it was laid out, or how it originated, did not appear. It was proved that the plaintiff, in common with his neighbors, had travelled along this road for a period exceeding twenty years, and that the plaintiff also used it as a mill road, but not always for that purpose, as he frequently sent to mill in other directions. There was no proof that the plaintiff had opened the road, or that he had worked on it, or exercised any dominion or controul over it, except as above stated; or that Davis, or those from whom he derived his title, had ever acquiesced in or done any act which could be construed into an admission of the plaintiff's right of way over the land, except that no objection ever was made previous to the obstruction for which this action was brought.

Under these circumstances we are to decide whether the plaintiff has acquired a right of way over the defendant's land. If he has, then the verdict is right; if he has not, then it is wrong, and must be set aside. I need not here repeat what is so familiar to every lawyer; that, after a possession of land for twenty years, a deed or grant will be presumed; and also that where a man has enjoyed and used a way over another's land for the same period, it will be presumed that he had originally a right to do so, the evidence of which has been lost by lapse of time. In matters of antiquity, the law substitutes the possession, in the case of land, and the use, in the case of a way, for the deed or grant; the nature and extent of which, in both cases, will depend on the nature of the possession and

use. To confer a title in either case, all the authorities, both English and American, concur that the possession and the use must be adverse to him who was the owner. This term, *adverse*, as applied to ways, according to our decisions in analogous cases, means such use as men make of their own property; and must be accompanied by such facts and circumstances as shew that it is claimed as a right exercised without the consent, and in opposition to the rights, of the owner of the soil.

It will be perceived from this, that I am not disposed to adopt the opinion intimated in *Roland vs. Wolfe*, (1 Bailey, 56) and in *McKee vs. Garrett*, (1 Bailey, 341) that in no case can a prescriptive right of way be acquired over the uninclosed land of another. Those cases were, doubtless, decided right upon their own facts, but the dictum above stated, in the broad terms in which it is laid down, was never satisfactory to the profession, and may be considered as modified by the subsequent case of *Smith vs. Kenard*, (2 Hill, 642, *n.*) Since this case was argued, we have carefully considered and examined it; and we all concur in the opinion that a right of way may exist by prescription over the uninclosed woodlands of another, subject to the qualifications and limitations hereinafter stated. As a general rule, I would say that the use of every such way is permissive, or held at sufferance, where the claimant has done no act shewing that he claimed the right adversely, and the allowance of the use by the owner of the soil has been unaccompanied by any act which shews a recognition, on his part, of the right of the claimant to use the road without his permission. Most of the old roads which, like this, lead from one public road to another, or from neighborhood to neighborhood, sprung up from accident. In the early settlement of the country, paths through the woods were made by repeated travelling along the same track. In process of time, by continued use, these tracks were enlarged into cart and wagon ways. They were convenient to the propri-

etor's neighbours and did not interfere with his dominion over the land. In the beginning, therefore, they may be said to have originated in the tacit permission of the owner. The use continued in the same way, no one ever supposing that a use thus commencing could ever ripen into a right. An adverse use must be something for which the owner may sue: it must be something hostile to his entire dominion over his property. In England lands are, generally, if not altogether, inclosed, and to enter on a man's land is, literally, to break his close; but, in this country, the fact is otherwise. Most of the land is uninclosed, and I can scarcely conceive it possible that the riding over such lands, and, especially, along a road which has originated in the implied assent of the owner, can be even a technical trespass, until the implied permission has been revoked. We feel the difficulty of laying down general rules to govern all cases, and it is not intended to do it on this occasion; but we think we may venture to say that no right of way can arise from merely riding or walking over a man's uninclosed woodland, unless there be some assertion of ownership by the claimant, or some act of the owner of the soil shewing an admission that the claimant had a right. Thus; if the claimant laid out the road and used it for twenty years; or if he worked on, enlarged, or kept it in repair; or if the owner of the soil cleared the land and left a lane for the claimant's use; these, with acts of the like kind, would seem to amount to an assertion of a right on the one part, and an admission of it on the other. The plaintiff's case presents no evidence of an adverse use, or of any admission of his right by the defendant; and it is the unanimous opinion of this court that the verdict should be set aside, and the motion for a nonsuit granted; and it is ordered accordingly.

Herndon, for the motion.

J. M. Devall vs. Joy Taylor.

Proceedings before an inferior Court are void, unless they carry upon their face the evidence of jurisdiction; and, therefore,

The oath upon which a Magistrate issues an attachment, though it need not be *taken* in writing, must be recited in the writ.

An affidavit in the disjunctive (of one *or* the other) of two facts, would be bad to sustain an attachment, though either, positively deposed, might be sufficient.

An affidavit that defendant "is *about* to remove out of the State personally," will not sustain a domestic attachment.

Before EARLE, J. at Abbeville, Fall Term, 1839.

The affidavit to a writ of domestic attachment, stated that the defendant "was about to remove out of the State personally, or so absconded and concealed himself, that process could not be served upon him." The writ was quashed, for insufficiency in the affidavit to give jurisdiction to the magistrate. This order the plaintiff moved the Court of Appeals to set aside.

Curia, per EARLE, J. The attachment acts authorize Justices of the Peace to grant writs of attachment in certain cases, on the oath of the plaintiff, returnable either to the next Court for the district, or before themselves, according to the amount sued for. The cases provided for, in which Justices have this extraordinary jurisdiction, are, 1st. Where the debtor is removing out of the district privately; 2d. Where he absconds and conceals himself, so that the ordinary process of law cannot be served upon him; and 3d. Where he intends to remove his effects. Although it has been held, in *M'Kenzie vs. Buchan*, (1 N. & M'C. R., 205,) that the oath of the plaintiff, establishing the particular state of facts which gives jurisdiction to the Justice, need not be in writing; yet it is clear, both on general principle and on authority, that it should be recited in the writ. This is universally true of all Courts of

inferior and limited jurisdiction—that their proceedings must shew, upon their face, that the subject matter is within their jurisdiction, else they will be regarded as nullities. And very many cases will be found in the English books, and in our own, of their being quashed on motion. The general rule, as stated by the Court in *Winford vs. Powell*, (2 Ld. Raym. 1310,) in regard to inferior Courts, is, that nothing shall be intended to be within the jurisdiction, that is not expressly averred so to be; though, in the case of a superior jurisdiction, nothing shall be intended out of it; (the same in 5 Mod. 322; 6 Mod. 223). Str. 8; 6 Term, 583; Whenever a special authority is given to Justices, it ought to appear that the authority has been exactly pursued. Lord C. J. Pratt said, in a case before him, “I do not see to what purpose we exercise a superintendency over all inferior jurisdictions, unless it be to inspect their proceedings and see whether they are regular or not. I have often heard it said, that *nothing* shall be presumed one way or the other in an inferior jurisdiction.”

If the proceeding shew upon its face that the Justice had no authority to grant the attachment, or if it fail to shew that he had, then no judgment could be given upon it, either by himself, or by the Circuit Court; but the whole is an absolute nullity, and it is of no consequence in what way the defect is brought to the view of the Court, or at whose motion it is quashed. *Hagood vs. Hunter*, (1 M'C. R., 511,) is exactly this case; and, perhaps, it would have been enough to refer to it. There the affidavit was, that the defendant was “about to remove from and without the limits, *or* so absconds and conceals himself,” &c. Here he is “about to remove out of the State personally, *or* so absconds and conceals himself,” &c. To authorize the attachment, there should be a precise allegation of some one of the three categories which give jurisdiction. To be “about to remove out of the State personally,” is very different from being in the act of “removing privately out of the district;” and there is as much reason to suppose the writ

issued on that part of the oath, as on the other. Indeed, I would consider an affidavit, or recital of one, in the disjunctive, as bad, although either of the facts deposed to might be sufficient.

This case is very unlike those of *Havis vs. Trapp*, and *Grisham vs. Deale*, (2 N. & M'C.R. 130.)—There, the motion was to allow defendant to introduce affidavits of himself and others to contradict the oath of the plaintiff, and to quash the attachment because it was not true. This was refused, because it made up a collateral issue, where the Act had provided that the plaintiff's oath alone should be sufficient; and the Court properly refused to go into evidence *aliunde*, when the attachment was regular and valid on its face.

Motion dismissed; the whole Court concurring.

Wardlaw & Perrin, for the motion. *Burt & Thompson*, contra.

A. R. Lawrence vs. Joel Gaultney.

The Judgment of a Justice's Court of another State is entitled to "full faith and credit" here, as a judicial proceeding, and is a good ground of action.

But, as its authentication is not provided for by the Acts of Congress, it must be proven on Common Law principles.

How such a judgment may be most conveniently proven.

Before EVANS, J. at Lancaster, Spring Term, 1839.

Sum. Pro. to recover the amount of two judgments rendered against the defendant by justices of the peace in North Carolina. The evidence produced consisted of the original judgments and executions, with a certificate of the Clerk of the County Court, that the persons whose names were signed to the judgments were magistrates, and that their signatures were genuine; and the certificate of the presiding magistrate of the

county court, that the person certifying was clerk. The Court held that an action might be brought on such a judgement, but that the evidence adduced was not sufficient to establish it, and therefore ordered a nonsuit.

Plaintiff appealed, on the ground that the opinion of the Court on the inadequacy of the evidence was erroneous.

Curia, per EVANS, J. Since the case of *Clark & Smith vs. Parsons*, (Rice's R. 16,) there can be no doubt an action may be brought on such a document as the plaintiff has endeavoured to establish. It is a judicial proceeding, and we are bound, under the constitution, to give it full faith and credit. But, if neither Congress, nor the State Legislature, has prescribed any mode for proving such judgements, (and the Acts of Congress, of 1790 and 1804, do not apply to this case,) then we must find in the Common Law the rules by which they are to be established. The fundamental rules of evidence are, that the best shall always be produced, and that every fact shall be proved by the oaths of witnesses, unless the law has prescribed some other mode. The plaintiff had to shew, 1st, that a justice had jurisdiction of his case by the law of North Carolina; 2d, that the person who decided it *was* a justice; and, 3d, that he did, in fact, render the judgement alledged. The last of these requisites would have been sufficiently established by the paper adduced as the original proceeding before the magistrate, if the signature of the latter had been proven, as in *Clark & Smith vs. Parsons*. Still, the proof must have been deficient, as in that case, for want of the *best* evidence on the other two points; for the certificates of the clerk and presiding magistrate of the county were not under oath; nor are they, by any enactment, made authentic in proceedings of this character. The law of North Carolina, by which the justice had jurisdiction of this case, might have been proved under the provisions of the act of Congress of 1790, or, according to our precedents, by the production of the printed laws of that state. In

the same manner, it might be shewn that the person who signed the judgment was a justice, if his appointment had been made by the legislature. If the appointment was by the governor, or by any other authority, then an exemplification of the office books, certified according to the Act of Congress of 1804, (2 Story's P. L. 947) would have proved it.

Motion dismissed; the whole court concurring.

Obadiah Law and Wife vs. Elijah Franks.

In an action for malicious prosecution, a declaration, alleging that the plaintiff was arrested, entered into recognizance, and was "afterwards therefrom discharged, and that the prosecution was wholly ended and determined," is not sustained by proof of acquittal before a petit jury.

The word '*discharged*' is not equivalent in pleading to '*acquitted*,' which term alone expresses a discharge upon trial *per pais*.

The Court will not hear a motion to amend a declaration after the case has gone to the jury, and is arrested by a nonsuit.

Before O'NEALL, J. at Laurens, Spring Term, 1839.

This was an action for malicious prosecution. Mrs. Lowe had been arrested, at the instance of defendant, on a charge of trading with a slave, and had entered into recognizance. On the indictment presented, the grand jury found a true bill, upon which the prisoner was acquitted before the petit jury. At the close of the plaintiffs' case, (which seemed a strong one,) defendant moved for a nonsuit, because the *allegata* and *probata* did not correspond.

The declaration set out the information, the arrest and the entering into recognizance, and then averred that the plaintiff was "afterwards therefrom [from her recognizance] freely and fully discharged, and that the prosecution was wholly ended

and determined." There was no allegation of a true bill found and acquittal before the petit jury. Upon this discrepancy the court was reluctantly constrained to order a nonsuit; which the plaintiffs moved to set aside,—

On the ground that the declaration was good and sufficient in law and was fully supported by the proof. And, in the event of failing on this ground, they asked leave to amend the declaration.

Curia, per O'NEALL, J. The general rule in pleading is that there should be "a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury, who are to ascertain the truth of the allegations, and by the court, who are to give judgment." (1 Chit. Pl. 236*). The declaration in this case will not stand the test of the rule, being silent in regard to a material part in the history of the facts.

In *Morgan vs. Hughes*, (2 T. R. 225,) Mr. Justice Buller makes the following remark on this subject (p. 231): "Saying that the plaintiff was *discharged* is not sufficient; it is not equal to the word '*acquitted*' which has a definite meaning. When the word '*acquitted*' is used, it must be understood in the legal sense; namely, by a jury on a trial." The word '*discharged*,' then, does not import, with requisite legal precision, a verdict upon trial *per pais*. Again, (2 Chit. Pl. 302, *n.*†) it is said that "the proceedings in the original prosecution are to be described as in the record of acquittal;" and it will not be pretended that, in the declaration before us, this rule has been observed. A proper description of acquittal before a petit jury is found in *Thomas vs. DeGraffenreid*, (2 N. & M'C. R. 144,) "*Legitimo modo acquietatus*." This is precise, and points with accuracy to the mode of discharge which will be given in evidence under it. The motion to set aside the nonsuit is dismissed. The motion to amend cannot be allowed:

* New ed. 268.

† New ed. 612d, note *l*.

it is too late to ask for that after the case has been before the jury. *Glenn vs. M' Cullough*, (2 M'C. R. 212.)

RICHARDSON, EVANS and BUTLER, JJ. concurred, EARLE, *dubitante*; GANTT, J. absent at the argument.

Sullivan, for the motion; *Young*, contra.

Benjamin Richardson vs. William Murray.

Where an obvious arithmetical error, in a discount specially pleaded, was corrected by the jury, so that the discount allowed was greater than that claimed by the plea, the court would not set aside the verdict.

Before RICHARDSON, J. at *Spartanburg*, *Fall Term*, 1839.

The defendant pleaded in discount to a note of \$970, the part value of a negro slave whom he had delivered to the plaintiff as security or satisfaction for a debt of \$500, "which negro," said the plea, "the plaintiff was to account for at his true value, or what he could be sold at; and the defendant avers that the said plaintiff was afterwards offered and could have obtained for the said negro man the sum of fifteen hundred dollars; and therefore declares and avers that the plaintiff is bound to account to him under the aforesaid agreement for the sum of \$900."

The jury found for the defendant; upon which the plaintiff appealed,—

Because the verdict contradicts the plea, which admits \$70 to be due to the plaintiff.

Curia, per RICHARDSON, J. held that a verdict otherwise satisfactory should not be set aside upon so obvious a mistake in terms only. If a new trial were allowed, the court would

also have to give the defendant leave to correct the arithmetical error in his plea and lay his demand at \$1000 instead of \$900; which would place the parties exactly where they now stood under the verdict.

Motion dismissed; the whole court concurring.

Choice, for the motion; *Henry & Bobo*, contra.

Wilson Nesbit vs. James M' Daniel, (late Sheriff of Greenville District.)

A writ in Trover cannot be served under the provisions of the Act of 1827, in any other District than that to which it is returnable.

It is the intention of that act that the taking of the bond, &c., therein prescribed, shall be *after* action brought by service in the usual way.

Before RICHARDSON, J. at Greenville, Fall Term, 1839.

This was a special action on the case against the late Sheriff of Greenville district, for failing to arrest Russel Price, and to take bond, under the act of 1827, upon a writ in Trover for a negro, at the suit of the plaintiff.

The writ was returnable to Spartanburg Court House, and had, besides the usual order for bail, the following endorsement: "Spartanburg district," &c. "To all and singular the Sheriffs" &c. "You and each of you are hereby required, without delay, to cause the defendant to enter into bond with sufficient security to the Sheriff of said district, for the production of a negro boy Job, in his possession, to satisfy the plaintiff's judgment in case he should recover against the defendant. Oct. 6, 1836.—T. TAPP, Clerk." This writ was lodged with the sheriff of Greenville district, and, upon his failure as above stated to make the arrest, this action was brought.

The court charged that this process was a good and sufficient authority for the sheriff of Greenville to arrest Price in his district, and the jury gave a verdict for the plaintiff of \$410.

Defendant moved for a new trial on the ground of error in the judge's charge.

Curia, per RICHARDSON, J. It was contended in argument on the circuit that, in virtue of our Act of 1827, under which the indorsement was made upon the writ before us, the sheriff of any district might arrest a defendant in Trover, notwithstanding he had not been served with the writ in the district to which it was returnable; and I so charged the jury, rather than keep them from the consideration of the merits of such a case, upon a question of construction, yet new and undecided. But I am satisfied, on more mature deliberation, that the act will not admit of this interpretation.

The Act of 1827 (p. 81*) provides, upon a proper affidavit made by the plaintiff in Trover, that an order shall issue "to all the sheriffs of the state, requiring them" &c. "to cause the defendant to enter into bond with sufficient security to the sheriff of the district *in which such action shall be brought*, for the production of the chattel sued for, to satisfy the plaintiff's judgment" &c. This is a remedial statute, and is to be liberally construed for its obvious purpose of securing the plaintiff in his chattel. But though, for this end, it may be proper that after action brought the sheriff of any district where the defendant happens to be shall take a bond payable to the sheriff of the district in which the action shall have been brought; certainly it is *not* requisite that the action of trover shall have the peculiar privilege of being commenced in one district by service of a writ in any distant part of the state. This would be an anomaly in our juridical system, not to be introduced upon mere construction, or any thing short of the imperative letter of the act. To use a language somewhat technical, each judicial district would then, as to the action of trover, be a

* 6 Stat. So. Ca. 337.

Westminster Hall, and all the rest be as *nisi prius* districts. A citizen of Pickens Court-house might be arrested and carried to make his defence in Charleston. Thus, while the first principle of our circuit system, (the original and exclusive authority of each court within its limits) was violated, its wholesome policy also would be utterly frustrated, which intends that the tribunal of justice shall be as convenient as possible, alike to plaintiff and defendant.

From this position, it follows that the service in Greenville, of the writ returnable to Spartanburg, would have been void, and of course no action will lie against the sheriff for having failed to make it. A nonsuit is therefore ordered.

The whole court concurred.

Perry, for the motion.

Sion Murphy vs. Joseph and Lotty Price.

A sheriff's deed under an execution, which should have conveyed the land of an intestate, but by mistake, was made to convey that of his administrator, was not permitted to pass the land of the intestate.

Where there was a variance between a judgment and execution, and the sheriff's title under them; if the error were in the judicial records, then the court might allow them to be amended; but otherwise, where the mistake was in the sheriff's deed, which is matter *in pais*.

Before O'NEALL, J. at Union, Fall Term, 1839.

Trespass to try title to land formerly belonging to John Prince, the defendant's father, who died intestate. The plaintiff proved an execution and sale of the land at the suit of *Sion Murphy vs. Isaac Pearson*, administrator of the deceased, and, shewing how they came into his possession, rested his claim

upon the sheriff's titles. The sheriff's deed recited the execution "*Sion Murphy vs. Isaac Pearson, administrator of John Prince, deceased,*" and stated a seizure and sale, *as of the land of the defendant in the execution.* The defendant moved for a nonsuit, which was ordered, "because the sheriff's deed did not convey the land of *John Prince, deceased,* but the land of *Isaac Pearson.*" "The plaintiff moved" says the presiding judge, "to amend the deed so as to conform to the execution and judgment; but I thought I had no right to amend a conveyance. The execution, or judgment, being records of the court, I could amend; but over a matter *in pais* I thought I had no authority."

The plaintiff appealed for error in ordering the nonsuit and refusing permission to amend; but—

Curia, per O'NEALL, J. confirmed the decision of the court below; GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurring. EARLE, absent.

Thompson & Dawkins, for the motion; *Herndon*, contra.

Samuel Stinson vs. Wm. Brennan, adm'r. of Crowder.

A surety on a note, who has let judgement go by default, and has paid the debt, has recourse upon his principal for indemnification, notwithstanding that the latter, who was sued at the same court, by defending the case, obtained a decree in his favour. But, *semble*, not if he had been notified of the defence.

Before BUTLER J. at Chester, Fall Term, 1839.

Sum. pro. for money paid by the plaintiff, who was surety on a note of William Crowder, intestate. He was sued, let judgment go by default, and paid the debt and interest. The

administrator of Crowder was sued at the same court, defended the case and got a decree in his favour. The defendant contended that he was not liable to indemnify the plaintiff, who might evidently have prevented the recovery against him: but the presiding judge 'thought that it was the defendant's own business, and if he did not defend the case and the plaintiff was compelled to pay the money, then the defendant's intestate would be liable to him.' *Peters vs. Barnhill*, (1 Hill, 234.)

A decree was given for the plaintiff, and defendant appealed,—

Because the court erred in holding that the defendant was liable to the plaintiff for the debt paid as surety, when it had previously decreed that the principal was not bound to pay the debt; especially as the defendant, having no notice of the suit, could not have been reasonably expected to defend it.

Curia, per BUTLER, J. A principal on a note occupies a double position, involving two liabilities. He is responsible to the party with whom he makes the contract, and, also, to his surety, who may have paid the money for him. If the surety had paid the money voluntarily when due,—as constantly occurs in commercial cities—it is conceded that he would then have his action. When the same payment is enforced by law, he cannot surely hold a worse position, nor the principal a better. To the suggestion that the surety might have resisted and defeated the recovery, he may reply that he was a stranger to the consideration of the note, and was privy to nothing more than the terms of an absolute obligation which he bound himself to make good if not punctually fulfilled. But if he had been made privy to his principal's defence, then he might have lost his right to redress.

Defendant's motion dismissed; the whole court concurring.

Thompson & Eaves, for the motion.

James B. Davis vs. D. F. Ruff.

In an action of slander, words affecting the pecuniary credit of a merchant need not be averred nor proven to have been used in relation to his occupation as a merchant; for, in their nature, they strike at the root of mercantile character.

Plaintiff in slander, who participates in the risks of a mercantile concern, but does not share in the profits, shall not recover for injury to his character as a merchant, without shewing special damage.

It is no slander of a *firm* to say that one of the partners is broke. The right of action on such words accrues to the individual.

A verdict in slander, although much larger than the discretion of the court would have awarded, will not be disturbed on that account alone.

Before O'NEALL, J. at Fairfield, Fall Term, 1839.

This was an action for slanderous words. They are charged, in the first count, to have been uttered of the plaintiff 'as a merchant.' The second count alleges that the plaintiff was a merchant, and charges that the words were spoken of and concerning him, without adding 'as a merchant.' The declaration also averred special damage.

The words proved were "he was broke, or he considered him broke, and he could not pay more than fifty cents in the dollar, probably not more than ten cents in the dollar."

"Dr. Davis's note would not do, he was broke, and the defendant had known this for some time."

"Dr. Davis was regarded as, or reported to be insolvent, and had been for some time."

The defendant, on being offered a note on some person, declined buying it: the person offering it commended it, saying the maker was good; and the defendant replied saying, "so every one would, twelve months ago, have thought Dr. Davis good: he had a note on him for which he would willingly take less than the amount."

On sale day, in May 1838, the defendant repeatedly said, "a report had come to the village of Winnsborough that Davis

had made an assignment, mortgage, or confession of judgment to his father to the amount of \$72,000."

To one of the witnesses, Woodward, he said he had made enquiries, and, from Daniel Kirkland, he found that it was confirmed. 'He said Kirkland or some other person had mentioned it to Dr. Davis, and he did not deny it.

The plaintiff was a planter, resident in Fairfield district, and connected at the time with the mercantile firm of W. B. Thompson & Co:—whether strictly a partner, or not, was disputed; and the presiding judge remarks,—

"The question on this part of the case was carefully submitted to the jury. They were told, unless the plaintiff was a merchant, he could not maintain his action without proof of special damage, which was, I thought, very slight. They were told, if the plaintiff had no share in the profits of the mercantile copartnership of which he was a member, that then, notwithstanding his liability for the debts, he was *not* a merchant to be affected by the publication of the slander."

The charge of an assignment or confession by plaintiff to his father, the judge considered to have been only the repetition of a report already prevalent, and says, "The only matter connected with it which could make him [defendant] responsible, is his communication to Dr. Woodward, in which he said that 'he had made inquiries, and, from Daniel Kirkland, found that it was confirmed.' He said, Kirkland or some other person 'had mentioned it to Dr. Davis, and he did not deny it.' The latter part of this communication, about the report being communicated to Dr. Davis and his not denying it, was contradicted by Kirkland, the person referred to." "As to the other charges," the Court observed, "there was no proof that they had been in circulation before the defendant spoke of them. In a conversation with Dr. Jennings, some time before the speaking of the words, the plaintiff told him he had been much embarrassed by being endorser, perhaps to the amount of \$72,000, but he had freed himself from most of it, at least

one half. This witness spoke of this conversation. Gen. Means said, in March 1838, he had heard it said by a neighbor, as a rumor from Chester, that the plaintiff was in debt to the amount of \$60,000. A. B. Williams said that in 1835 or '36, Mr. Marshall, of Columbia, was uneasy on account of indorsing for the plaintiff. Col. John Glenn, (an uncle of the plaintiff by marriage,) said he had heard from the plaintiff's relatives that he was much involved. Dr. Furman said the people regarded the plaintiff as lavish and extravagant."

The jury found for the plaintiff \$3,500.

The defendant moved for a nonsuit,—

Because the *Colloquium* in the first count, averring that the words were spoken of the plaintiff in his capacity of a merchant, was not sustained by the proof; and because the second count did not contain this averment, which was essential.

And for a new trial,—

1. Because the plaintiff was not a merchant, at the time the words were spoken, or, if he was, the words did not relate to his occupation as a merchant and therefore are not actionable.

2. Because, if he was a merchant, and the words did relate to such his occupation, the action should have been in the name of himself and partners; the more, as special damages were laid in the declaration and evidence was offered in relation to them.

3. Because the damages were excessive and out of all proportion to the nature of the offence; especially as injurious reports were in circulation, before the alledged words were spoken, and had originated in the declarations of the plaintiff himself.

Curia, per O'NEALL, J. The general rule is, as stated in 1 Saund. 242, *a.* note 3, that where the words are only actionable because they are spoken of a tradesman, the plaintiff must

aver and prove that the words were spoken in relation to his trade. But to this rule, there is one plain and well recognized exception; that where the words are such as affect a man's credit, then it is neither necessary to aver, nor to prove that they were spoken in reference to the particular trade or business which the party was pursuing. The reason assigned by Starkie, (St. on Sl. 134,) is that of common sense: "A general charge, of a want of credit, necessarily includes the particular one, and is equally pernicious with a more precise allegation." Nor is there any artificial rule which prevents us from adopting this reasonable view. Indeed, all the authorities acknowledge and sustain it, with the exception of the dicta in *Serjt. Williams'* notes to 1 Saund. 242, *a.* 3, and 2 *id.* 307. In these, it is manifest that the learned, and, in general, very accurate editor, did not advert to the distinction which Mr. Starkie has pointed out, and which seems to be well supported by very ancient decisions. In *Read vs. Hudson* (Ld. Raym. R. 610,) the plaintiff declared in one count that he was a laceman, and that the defendant, speaking of his trade, said, &c: in another count he says that the defendant, *ex ultiori malitia sua, de statu* of the plaintiff *colloquum habens*, said these words, "you are a rascal; you are a pitiful sorry rascal; you are next door to breaking." The question arose on this last count. The court, in the absence of Holt, C. J. gave judgment for the plaintiff, declaring that he was a tradesman, and that, where the words were spoken *de statu suo*, it is equivalent to *arte sua* and to be intended of his trade. The words in that case imported a want of credit, they affected his condition, and hence applied to him in his trade as well as any other capacity in which he stood. So in *Stanton vs. Smith*, (Ld. Raym. R. 1480,) it was held to be actionable to say of a tradesman "he is a sorry, pitiful fellow and a rogue, he compounded his debts at 5s. in the pound," though there is no colloquium of his trade. That would seem to be in point to this case upon the second count, in which, as in that, there

is no colloquium about his trade. In *Candrey vs. Highly*, (Cro. Car. 270.) These words,—“Thou art a drunken fool and an ass, thou wert never a scholar, and art not worthy to speak to a scholar, and that I will prove and justify,”—spoken to a physician, were held to be actionable without any colloquium concerning his profession. The fact, that the words were in that case *addressed to* the physician, cannot of itself dispense with the colloquium. The same words spoken *of* him would have had the same effect. They imputed a want of knowledge, which, like a want of credit, attached to the person and went with him in every business and affected him therein. After these authorities it cannot be necessary to pursue further the defendant's grounds for nonsuit: they cannot avail him.

As to the grounds for new trial; the court held that, on the first, which was a question of fact, the jury had been properly charged, and their decision was final: and that, as to the second, it was no slander of a firm to say that one of the partners was broke. Such words went, not to the particular business, but to the general mercantile character of the individual. In regard to the damages, the court adhered to the opinion of the judge below, that, although they were much larger than, according to his view of the case, he would have found, yet if there was deliberate malice then the verdict was none too high; and that was a question for the jury, which should not be disturbed on a mere difference of opinion.

Motion dismissed; RICHARDSON, EVANS and EARLE, JJ. concurring. GANTT and BUTLER, J. dissented.

Clark, & M'Call, for the motion; *Gregg & Player*, contra.

* Com. Dig. action on the case for Defamation, D; Tom. Law. Dict. Action, ii. 1.

Executors of W. Thomas vs. Executors of J. R. Ervin.

Assumpsit against an Attorney for negligent delay whereby a debt was lost, though brought as soon as the loss could be definitely ascertained, was barred by the statute of limitations; the actual neglect and the circumstances of the debtor which rendered the loss probable, having existed four years previous.

And the damage subsequently accruing did not constitute a fresh cause of action.

Before EVANS, J. at Darlington, Fall Term, 1839,

Ervin, an attorney, received from Thomas, in the year 1819, for collection, the bond of one Wiggins; and accordingly, on the inquiry docket of Marion district, S. T. 1820, appears the case of *W. Thomas vs. B. Wiggins*, in debt, with a note of "*judgment final*": but no judgment was ever entered up, or execution issued. Very soon after, Thomas died. In 1829 Ervin again brought suit in the name of Thomas, entered up judgment, issued execution, and made every effort to procure the payment of the debt. But Wiggins had assigned his property, the year before, for the payment of his debts in a certain order, and, (the assignees having filed a bill against the creditors in 1831, on which a decree was had in 1836, and the estate proving inadequate to the liquidation of its debts,) the greater portion of this claim was lost, in consequence of its being only a bond debt at the date of the assignment. It did not appear, that the executors of Thomas were aware, prior to the decree, that no judgment had been entered up previous to the date of the assignment.

The jury found for the defendants, under the instruction of the court that the plaintiffs were barred by the statute of limitations. And from this opinion of the court the plaintiff, moving for a new trial, appealed.

Curia, per EVANS, J. There are four periods, in the history of this case, at one of which the statute must have commenced

to run; 1st. When Ervin neglected to enter up judgment in 1821; 2d. When Wiggins assigned his property in 1828; 3d. When Ervin sued Wiggins in 1829, in the name of Thomas, who had been eight years dead; 4th. When it was fully ascertained, by the decree of the Court of Equity in 1836, that the debt was lost.

The three first of these periods are more than four years from the commencement of this action in 1838, so the question is reduced to the inquiry, whether the statute commenced to run before the effect of Ervin's negligence was fully ascertained by the final decree of the Court of Equity in 1836.

In the consideration of the case we must carefully distinguish between the act from which the plaintiffs' loss arose, and the effect which resulted from that act. The plaintiffs' complaint is that Ervin, as their attorney, so negligently managed their case, that they have lost their debt. It is the *negligence*, then, of which they complain. The loss of the debt is a consequence of the negligence, and these stand towards each other in the relation of cause and effect. If Ervin had entered up judgment and issued execution, the subsequent assignment of Wiggins, the suit of 1829, and the final decree, would have been wholly immaterial to the plaintiffs. They would have had a lien on Wiggins' estate, which nothing afterwards occurring could defeat. I think therefore we may safely conclude that the plaintiffs' cause of action was the negligence of the attorney, and that what occurred afterwards was but the consequence of that neglect.

If this case be considered in reference to authorities, the same conclusion will follow. I am not aware that the question has been settled in our own courts, but it has often been decided in England and in the other states of our confederacy. Thus in *Miller vs. Adams*, (16 Mass. R. 456,) which was an action against a sheriff for negligently making an insufficient return. The return was in 1808, and judgment the same year: in 1814 the judgment was reversed by writ of

error on account of the insufficiency of the return. The question was, at what time did the action accrue of the plaintiff. The court say, "we are all of opinion the action accrued on the return of the writ into the clerk's office." So also, in *Short vs. M'Carthy*, (3 Barn. & Ald. 626,) the attorney, who had been employed for the purpose, neglected to examine whether certain stock which the plaintiff was about to purchase, stood in the seller's name on the books of the bank of England. The attorney reported that it did, and, upon the faith of this, the plaintiff purchased. More than six years afterwards it was ascertained that the report made by the attorney was untrue, and the plaintiff consequently lost the benefit of his purchase. The court held that the statute began to run from the time of the attorney's neglect. The same principle was decided in New York in the case of *Troup vs. ex'ors. of Smith* (20 Johns. R. 33.) But the case which most nearly resembles this in every particular is that of *Wilcox vs. Executors of Plummer*, (4 Peters' R. 172.) A note of one Banks, endorsed by Hawkins, was placed in the hands of Plummer, an attorney, on the 28th January, 1820. Judgment was recovered against Banks on the 20th August, 1820, but he proved insolvent. In February 1821, the attorney sued Hawkins in the name of wrong plaintiffs, and was nonsuited in 1824. In the mean time the note, as to Hawkins, was barred by the statute of limitations, the action which had been brought being a mere nullity. Thereupon the plaintiffs sued Plummer in the circuit court of the United States for the district of North Carolina. The case turned upon the question whether the statute of limitations began to run from the time of the attorney's neglect to sue Hawkins, within a reasonable period after receiving the note, or at the time when the effect of this negligence was manifested by the nonsuit of the plaintiffs. The supreme court decided that the statute commenced at the time of the negligence. Between that case and this, there is a remarkable similitude in every particular.

In both, the relation of client and attorney continued to exist until the debts were finally ascertained to be lost, and the negligence of Plummer was as continuous as that of Ervin.

By our statute of limitations, an action must be brought within four years after the cause of it has accrued; so that the question always is, when could the plaintiff have had his action? The answer is, whenever the contract has been violated, if it be on a contract, or, if it be for a tort, then when the act was done from which the injury to the plaintiff arose. It may be, that the full extent of the injury is not developed, but that cannot vary the case. Can it be doubted that the plaintiffs could have sued Ervin after he had neglected to enter up judgment, so as to create a lien on Wiggins's property, or that the jury might have given damages for the injury they had sustained? In the case of *Russel vs. Palmer*, (2 Wilson, 328,) one Steward had been sued and held to bail. He was afterwards surrendered by his bail; but the attorney neglected to charge him in execution; in consequence of which neglect, Steward was discharged. Lord Camden directed the jury to find against the attorney for the whole debt, £3000. A new trial was granted, because, the action being for damages, the jury should have been left to find what damage they thought fit. On the next trial, they gave £500, Steward not appearing to be insolvent, or unable to pay the debt.

From all the cases, I think it manifest that the plaintiffs' action accrued from Ervin's neglect to enter up judgment and issue execution against Wiggins. If the damage was the cause of action, then it would follow that a new action might be brought for every new developement of damage; and the plaintiffs might have sued Ervin for the negligence in 1821, and again when the debt was jeopardized by Wiggins's assignment; and, if in these two actions they did not recover the whole debt, they might sue again for the balance after the final decree. But the reverse of this has been decided in

Fetter vs. Beale, (1 Salk., 11.) Upon the whole, we are all of opinion that the plaintiffs's action was barred by the statute of limitations; so the motion for a new trial is refused.

Law for the motion. .

J. Johnson vs. L. Wideman.

A witness attending upon a subpoena ticket alone, without writ, is entitled to his fees from the party cast in the suit.

Where the successful party has paid witnesses subpoenaed on *both sides*, who had already been paid, without his knowledge, by his defeated adversary, he shall, nevertheless, have their fees taxed against the latter.

And the party cast may recover at law, from the witnesses, not what he paid, but what they fraudulently received from the other party, to his damage.

Before EARLE, J. at Abbeville, Fall Term, 1839.

Appeal from taxation of costs. Witnesses who had attended for both parties, (having been already paid by the defendant, who was defeated in the suit,) were afterwards taxed for the plaintiff. The clerk also allowed, for other witnesses who had attended for the plaintiff, upon subpoena tickets only, without any writ, the sum of *2s. 4d. per diem*. Defendant's motion to strike out both these charges was refused. It appeared that the witnesses subpoenaed by both parties, had been paid by the plaintiff as well as by the defendant.

Defendant, on appeal, renewed his motion below.

Curia, per EARLE, J. held that "witnesses summoned by ticket only, might not be held liable to process of contempt, or otherwise, for refusing to attend; yet, if they chose to waive the informality, no one else could complain, and they were entitled to be paid, at least, their *2s. 4d. per diem*, according to *Bratton vs. Clendennen*. (Str. R. 472.)"

As to the witnesses subpoenaed by both parties, it was held that if the defendant had paid them before the taxation, and the plaintiff *had not*, then their costs should not have been allowed again; but if the plaintiff had paid them, *not knowing* that the defendant had done so likewise, then he was entitled to have whatever he had thus expended, taxed against the defendant. "In such case," the Court observed, "the defendant could recover at law, from the witnesses, not the sum which he himself had paid them, but that which they had improperly and fraudulently received a second time, and which was ultimately collected from him."

The whole Court concurred

Wardlaw & Perrin for the motion; *Burt*, contra.

Nathan B. Arrants vs. Robert W. Dunlap.

A Commissioner of special bail has no discretion to discharge, under the prison bounds Act, one who is *accused* of fraud, &c. He is imperatively required to refer that accusation to a jury.

The distinction formerly existing in regard to the judicial authority of the Commissioner of special bail in cases of arrest on *mesne* and on *final* process, (2 Hill, 433,) is done away by the Act of 1833.

Before G. Q. McINTOSH, Commissioner of Special Bail for Kershaw District.

The defendant, arrested and imprisoned on bail process, at the suit of one Arrants, moved, before the Commissioner of Special Bail, to be discharged, on making an assignment to the plaintiff of his schedule, which had been duly filed. The plaintiff, accusing him, upon disclosures elicited by a cross examination of the defendant, of dishonest omissions in his schedule, and of a fraudulent assignment to his brother,

opposed the motion. The Commissioner referred the case, at this stage, to a jury organized under the provisions of the Act of 1833, (p. 44; 6 Stat. So. Ca. 491;) and, the schedule being found false and fraudulent, the defendant was returned to jail.

Of several exceptions taken by the defendant on appeal, and which were overruled, the only one involving matter of general interest was, that the Commissioner ought, himself, to have decided the question of fraud, according to the terms of the Act of 1788. (P. L. 456; 5 Stat. So. Ca. 78.)

Curia, per BUTLER, J. We are of opinion that the Commissioner proceeded correctly. According to the construction given, in *McClure vs. Vernon*, (2 Hill, 433,) to the 4th and 7th clauses of the Act of 1788, there existed a distinction between the powers of the Commissioner of Special Bail in *mesne* and in *final* process. In cases of arrest under *mesne* process, he could, under the 4th clause, try the question of fraud in the schedule, so far as to judge whether the prisoner's oath should be believed or not, and whether, therefore, he should be discharged: while, under the 7th clause, relating to prisoners in execution, his power to discharge was only in the absence of any accusation of fraud, &c.; and it would seem that the accusation alone was enough to require the intervention of a jury.

But this distinction could no longer obtain after the Act of 1833, which does not recognize it, and, in all probability, was intended to obviate the difficulties arising out of it, and to do it away. The preamble sets out that, as there was no mode prescribed for empannelling a jury under the Act of 1788, some provision ought to be made for that purpose. It is then declared, "that whenever a prisoner, confined on *mesne* or *final* process, applying for the benefit of the Act aforesaid, shall be *accused* by the plaintiff, or his agent, of fraud, or of his having given an undue preference to one creditor to the prejudice of the plaintiff, or of having made a false return, or

having gone without the prison walls or prison rules, as the case may be, it shall be lawful for the Judge, or Justice, or Commissioner of Special Bail, who shall hear the prisoner's application," to organize a jury according to the directions of the Act, to try the question. The plain meaning of this clause is, that no prisoner shall be discharged by a Commissioner of Special Bail, after he shall have been *accused* of fraud; but that it is the imperative duty of that officer, after such accusation, to call to his assistance a jury. If the jury should sustain the plaintiff's accusation, the prisoner must be remanded; otherwise he must be discharged.

Proceedings of the Commissioner confirmed; the whole Court concurring.

Smart for the motion; *Withers*, contra.

Isaiah Dubose vs. Administrator of S. L. Dubose.

The order for judgment, indorsed by the clerk upon the record, is an 'interlocutory judgment,' as contemplated by the Act of 1746, 'for preventing the discontinuance of process and abatement of suits;' and, after such order had, an action within the provisions of that law will not abate by the death of a party.

Before EVANS, J. at Darlington, Fall Term, 1839.

This was an assumpsit; in which, for default of appearance, the usual order for judgment was indorsed upon the record. Very shortly after, the defendant died. Plaintiff then sued out a *Sci. Fa.* (under the Act of 1746, P. L. 212; 7 Stat. So. Ca. 191,) against his administrator, who also made default, and the case was put upon the inquiry

docket. As no interlocutory judgment had been entered up, the Court was of opinion that this case was not saved by the Act, and, therefore, should abate by the defendant's death.

Whereupon the plaintiff appealed.

Curia, per EVANS, J. At common law, the death of either party before final judgment, abated the action. To remedy the inconvenience of this, our Act of 1746, provides "That, in all actions to be commenced in any Court of record in this Province after the passing of this Act, if any plaintiff shall happen to die after an interlocutory, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted by the executors and administrators of such plaintiff. And if the defendant die after such interlocutory judgment, and before final judgment obtained therein, the said action shall not abate, if such action might be originally prosecuted against the executors or administrators of such defendant."

The next clause of the Act provides for the issuing of a *Sci Fa.* to shew cause why damages should not be assessed; and, if no cause be shewn, then a writ of inquiry of damages shall be awarded, which being executed, final judgment shall be rendered for the plaintiff.

On the hearing of this case, I thought it not within the provisions of the Act, because no judgment had been entered up; but, upon further consideration, I am persuaded that my first impression was wrong, and in this opinion all my brethren concur. We conceive the *interlocutory judgment*, spoken of in this Act, to mean nothing more than the *order* for judgment, by default either of appearance or plea, which the clerk, according to our practice, makes on the back of the declaration. No judgment is ever entered up on this; but the case goes upon the inquiry docket, whither it would have no right to go unless the order were, in fact, the judgment. The case of *Kincaid vs. Blake*, in attachment, (1 Bailey, 20,) was decided on this principle; and the death of the defendant

after the expiration of the rule to plead did not abate the suit. We are therefore of opinion that the appellant's case did not abate by the death of the defendant, and that the plaintiff had a right to sue out a *Sci. Fa.* and to have his damages assessed, unless some good cause were shewn to the contrary, according to the practice of the Court.

The whole Court concurred.

The State vs. William Thompson.

After a prisoner has pleaded not guilty, he may not avail himself of misnomer in the indictment, either on his trial, or in arrest of judgment, or on motion for a new trial.

Before O'NEALL, J. at Lancaster, Fall Term, 1839.

The prisoner was convicted of petit larceny. In the *body* of the indictment he was called by the name of William Foster, instead of William Thompson. The *indorsement* was in his true name. He pleaded to the indictment, and the case had gone to the jury, and had been argued in part, before it was objected that William Foster, and not the prisoner, was the person charged. The presiding judge thought that the objection, if good in any shape after a plea of not guilty, could only be taken advantage of in arrest of judgment.

Defendant moved in arrest of judgment and for a new trial, on the following grounds:

1. Because the indictment charges the offence to have been committed by William Foster; not by the prisoner.
2. Because his Honour charged the jury that a defect in the indictment could not avail the prisoner on his trial before them.

Curia, per O'NEALL, J. refused both motions; adhering to the rule (in 1 Chitty Cr. L. 202,) that "the name and addition of the party indicted ought regularly to be truly inserted in every indictment: but, whatever mistake may be made in these respects, if the defendant appears and pleads not guilty, he cannot afterwards take advantage of the error." It was observed that there was no hardship in the rule; for the prisoner lost no advantage or privilege by it on his trial, and, if he had need afterwards to resort to a plea of *autre-fois convict*, he would be allowed to shew that he was the same person heretofore convicted by the name of William Foster.

The court concurred unanimously.

Wright & Clinton for the motion; *Player*, contra.

Lewis Brown vs. Sergeant Griffin.

A "true bill" found, constitutes a presumption of probable cause for the prosecution, and a plaintiff in an action for malicious prosecution, who had proved his general good character and defendant's malice, was yet non-suited for want of express evidence to rebut this presumption.

Before RICHARDSON, J. at *Pickens*, Fall Term, 1839.

This was an action for a malicious prosecution. The plaintiff rested his case upon the defendant's information on oath,—on which had ensued a warrant, an arrest, an indictment for perjury, and a "true bill" found by the grand jury;—upon evidence of his own general good character; upon the fact that the alledged ground of prosecution was an occurrence of twenty-seven years standing, which the defendant had been acquainted with all along; and upon the defendant's admis-

sion (as witness on the trial) that a late quarrel with the plaintiff was, in part, his motive for proceeding against him. The Court ordered a non-suit, because the plaintiff had made no shewing of a want of *probable cause* for the prosecution.

The plaintiff moved to set aside the non-suit.

Curia, per RICHARDSON, J. held that "where the grand jury have returned a true bill upon the charge made, such finding amounts to a judicial recognition that probable cause does exist. Hence arises a rule, that a plaintiff, suing for damages in such a case, must *prove the absence* of probable cause; and, if he fail to do so, such judicial recognition is *prima facie* proof of a probable cause."

And it was considered that, although the plaintiff's character might have given him a strong defence on his trial, and the staleness of the charge, coupled with the quarrel that ultimately gave rise to it, were pregnant evidence of the defendant's malice, (which is one of the essential grounds for this action,) yet they did not in the least tend to shew that the prosecution had not been instituted, according to C. J. Marshall's definition, on "such circumstances as warrant suspicion." (*Locke vs. U. States*; 7 Cranch, 339.)

Motion dismissed; EVANS, EARLE and BUTLER, JJ. concurring.

Thomas Hughes, Jun. vs. Thomas Hughes' Sen.

Defendant's admission that "he was willing to settle, and to pay any thing that might be due on a fair settlement; but he thought he had paid plaintiff enough," did not prevent the bar of the statute of limitations.

The purchase of one's land at Sheriff's sale, with an agreement that he shall remain in possession and refund the money at an indefinite period, does not create a *continuing trust* to bar the statute of limitations.

Before O'NEALL, J. at Union, Fall Term, 1839.

Assumpsit, commenced in 1838. Plea,—the general issue and the statute of limitations.

At the instance of defendant, the plaintiff, in 1826, purchased, at sheriff's sale, the defendant's land; but did not take titles. He agreed to satisfy, to the amount of his bid, (\$1500,) the judgment debts of the defendant, who was to remain in possession of the land, and to refund him the money. Between that time and 1828, the plaintiff laid out, in pursuance of this agreement, \$1373 06; and, in the same interval, defendant refunded \$474 93. In 1829, defendant, at first, refused to give plaintiff \$100, but afterwards let him have it. On the 4th February, 1833, defendant's son paid plaintiff \$100, at which defendant was much displeased when he heard of it, saying that he owed plaintiff nothing. In March, 1838, (before this action was brought,) being served with a rule to shew cause why the sheriff's title should not be made, defendant stated that the plaintiff had bid off the land to him as a friend; that he was willing to settle and to pay any thing that might be due on a fair settlement; but he thought that he had paid the plaintiff enough. He repeated the same expressions, shortly after, to the plaintiff's attorney. The jury, being instructed by the Court that the plaintiff was barred by the statute, found for the defendant, and the plaintiff moved for a new trial,—

Because the defendant's promises took the case out of the statute, and—

Because this was such a case between trustee and cestui-que trust, as the statute could not run against in equity; and the same principle should operate here.

Curia, per O'NEALL, J. The rule laid down in *Young vs. Monpoey*, (2 Bailey, 278,) has been uniformly followed, that, after the lapse of time within which a debt would have been barred by the statute, to prevent the bar "there must be

either an express promise to pay, or an admission of a subsisting debt, which the party is willing and liable to pay." It is recognized and enforced in *Reigne vs. Desportes*, (Dud. Rep. 118,) which declared the old debt to be the consideration, and the new promise the cause of action. Therefore, if the new promise could not entitle the plaintiff to recover, it is clear that the bar of the statute applies. In the case before us, the plaintiff's cause of action began, at the latest, from his last payment in 1829, for the defendant's benefit, and in 1833, the time of the statute had run out. The money previously paid by the plaintiff, and up to that time constituting his cause of action, then ceased to be such, and after that, his right of action depended on the defendant's admission. In March, 1838, he said "the plaintiff had bid off the land for him as a friend; he was willing to settle and pay any thing which was due, on a fair settlement; but he thought he had paid the plaintiff enough." To Mr. Thompson, just before the commencement of this suit, he said "he thought he had paid the plaintiff enough; he, however, was willing to settle, and if there was any balance, he would pay it." These two acknowledgements are in substance this—"I think I have paid the plaintiff; I will however settle, and if there is any thing due, I will pay it." Upon this, as the cause of action, can there be a doubt that the plaintiff could not recover? Certainly not, unless he could shew a settlement and a balance against the defendant.

In *Allcock vs. Evans*, (2 Hill, 326,) defendant's saying his partner ought to have paid the note, and "Allcock ought to be paid," was held neither to be an express promise to pay, nor an admission of a subsisting debt, which he was willing and liable to pay; and his proposition that he would "pay no interest, but would pay the principal by giving his note, payable in three, six and nine months, with interest from the date," not having been confirmed by acceptance, was considered not to be a promise to bar the statute. In *Bonnetreau*

ads. *Johnson*, (Riley's L. C. 1,) defendant's plea of the statute was, it is true, defeated by these words: "I have also an account against Dr. Johnson, which I will discount against his when I get mine made out, and will settle with you." These expressions do somewhat resemble those of the present case; but Johnson, J. observed there, that "the proposition of the defendant to discount his own account against the demand, is in itself a distinct concession of his liability to pay it; and the declaration that he would *settle* with the plaintiff's agent, when his account was made out, is in common parlance substituted for a direct promise to pay, and, as used here, would scarcely admit of any other construction." In the case before the Court, the same word "*settle*" was used, but certainly not in a sense synonymous with "*pay*."

On the second ground of appeal, the Court said "this is not a case of technical continuing trust, against which the statute of limitations will not run. If it was, the plaintiff would have no business here. Equity, not law, would be his remedy. If there is a trust in the matter, (and I do not think there is,) it would be a constructive trust, against which the statute runs both at law and in equity. But this is a mere legal demand. The plaintiff has paid money for the defendant at his request."

Motion dismissed; EVANS, EARLE and BUTLER, JJ. concurring.

Thomson for the motion; *Herndon*, contra.

J. P. Farr, et al. heirs at law of W. B. Farr, vs. W. P. Thompson, Executor of W. B. Farr.

The rule, that one shall not discredit his own witness, is for the protection of the witness himself, and shall not be dispensed with by consent of the parties litigant.

And the rule excludes, not only general evidence against the character, but former inconsistent declarations; and every matter that would be inadmissible or irrelevant, except for the purpose of impeaching the credit.

But a party may introduce contradictory evidence upon facts material to the issue, and thus incidentally impeach the credit of his own witness; and this will not let in evidence of good character in reply.

Where, however, a party was, irregularly, allowed to introduce the inconsistent declarations of his own witness, evidence of character ought to have been admitted in reply.

A will legally executed shall not be set aside on the mere ground that its provisions are in favour of a mulatto woman, with whom the testator (a hard drinker and paralytic) had lived in disgraceful intimacy; who had had great domestic influence over him, and of whom he had sometimes appeared to be in personal fear.

There must be proof, not only of influence, but, that it had been expressly and unlawfully brought to bear upon the will.

A disposition of property, though ever so capricious and unreasonable, will not be avoided on that ground alone.

"What facts, if proved, shall constitute undue or improper influence, to avoid a will, I hold to be a question of law; and I think in cases of this kind, the particular sort of influence should be set down in the pleadings." (*Earle, J.*)

Before EVANS, J. at Union, Spring Term, 1839.

This case arose upon a contested will. The wide ground occupied by the opinion of the Court, leads to the necessity of considerable detail in the history of the case, which is given in the words of the Circuit Judge's report.

"The testator, W. B. Farr, was a man about 66 years of age, at the time of his death, which took place in 1837. He made his will in August, 1836, and a codicil in February, 1837. By the will he gave all his estate, real and personal, which was estimated to be worth 50 or 60,000 dollars, to the appellee, W. P. Thompson, and appointed him sole executor.

The codicil was a revocation of a paper executed some years before, whereby he gave to his nephew, Farr Duff, certain property after his death. The validity of the will had been contested before the Ordinary on several grounds, but he had decided in favor of the executor. The heirs at law appealed, and the case was brought up to this court to be tried, on the following assignments of error in the decision of the Ordinary.

1. That the will was not executed according to law.
2. That it was obtained by undue influence exercised over the testator by the executor, Dr. Thompson, and by a negro woman named Fan, and her son Henry.
3. That it was obtained by threats made by the same persons.

“To the understanding of the evidence which will be hereafter detailed, it is necessary I should state that the testator was never married. He had lived for many years in a state of illicit intercourse with a mulatto woman, his own slave, who assumed the position of a wife, and controlled, at least, all the domestic arrangements of his family. The issue of this intercourse was a boy, named Henry, who was acknowledged by the testator as his son. Many years before his death, he had endeavored, by application to the Legislature, to effect the emancipation of this boy. These efforts proving unavailing, the testator, after, or about the time he arrived at manhood, sent Henry to Indiana, where he had him settled, and provided him, from time to time, with considerable sums of money. His mother, Fan, was a bright mulatto, and Henry was nearly white. Dr. Thompson, the executor, had been the family physician of the testator, and was called in frequently to prescribe for Fan, who was frequently unwell. The appellants are the half-brothers of the testator, and his nephews and nieces, of the whole blood, who are entitled to his estates if he died intestate.

“The will was executed in the presence of three witnesses, who saw him sign it, and attested it in his presence. The

testator came to the house of Mr. Dawkins, one of the attesting witnesses—the other witnesses were sent for. The testator produced the will from his pocket, and folded it so that the witnesses could not see the writing. Dawkins objecting to sign it without knowing what was in it, the testator replied it would never do them any injury, and he did not wish to make a blowing horn of every thing he did. The witnesses then attested it, but none of them could say whether there was any writing above the signature, as the testator carefully folded down the paper so as to conceal the writing, if there was any. The will was an exact copy, or nearly so, of one written for the testator by Judge O'Neill, in 1828. The only difference that I recollect, was, that the legatee and executor was changed by substituting Dr. Thompson in the place of Judge O'Neill, as legatee and executor.

“The only point made on the first ground, was on the question whether the will was not blank when executed, and filled up afterwards. I thought the evidence afforded no ground to impeach it for this cause.

“On the opening of the case, the appellants called Mr. Dawkins, one of the witnesses. Among other questions asked him, was, if at the time he attested it, it was signed by the testator, and whether he had not said it was neither signed nor acknowledged by the testator at the time he attested it. The witness admitted he had so said after the testator's death, and explained that at the time of execution he was in bad health, and that he was unable for some time to call to recollection the facts, but afterwards he remembered all the circumstances, as he had stated them in court and before the Ordinary. He was also questioned as to some other circumstances, about which he had made statements to other persons—some he denied and some he admitted and explained. The appellants were allowed to examine witnesses to prove that he had formerly said the will was not signed or acknowledged before him; and also that he had stated to them some

facts which he denied on his examination in court. This evidence was offered for the declared purpose, not of shewing the witness was not entitled to credit, but to shew his memory was not to be relied on. The rule as stated in *Perry vs. Massey*, (1 Bailey R. 32,) is that the party shall not be allowed to impeach his own witness by shewing his character is infamous, but may offer evidence to shew that the witness is mistaken, by proving that at other times he had made a different statement of the facts. The evidence was admitted on this ground, and no other use was made of it in the argument. It appeared that formerly, in 1828, the testator had made a will whereby he gave his whole estate to Judge O'Neill, and appointed him sole executor. This was accompanied by written instructions to Judge O'Neill, declaring certain trusts in relation to the property, which the executor was to execute for the benefit of Fan and Henry. At the time of the trial before the Ordinary, the executor presented a paper signed by himself, in which he set out certain secret trusts, which he was by agreement with the testator to execute. This paper was offered in evidence and rejected, because it was the declaration of the executor, and could not be received in evidence for him. In the course of the trial, the appellee proposed to go into evidence of the general good character, both of the witness, Dawkins, and the executor, Dr. Thompson. In both cases the evidence was rejected. The character of Dawkins was not assailed, and the character of Dr. Thompson was not put in issue by either the evidence or the pleadings."

Touching the charges of undue influence, the evidence was, that Farr was a man originally of strong mind, and, as one witness said, "as hard headed as any man," but that he was much enfeebled by hard drinking, and "his memory was impaired by a stroke of the palsy, but he was capable of doing business." He talked often about the disposition of his property; said sometimes, he would give it to his half-

brothers; sometimes designated other relations; sometimes said none of them should have a cent; that Fan should have it all; that he would leave it to Henry.

Fan had the influence over him of a white woman and a wife. He put his mare to a horse after having refused to do so, because she desired it; had a clock which he cursed, and said he would not have bought it but for Fan; promised to destroy a dog that killed sheep, but did not do it because she objected; bargained for a negro, but would not buy till her pleasure was consulted; sold a negro girl at her desire, and made titles to another one that she offered for sale as her own, and when he had made the titles, said "he hoped she would now be satisfied, as there was no other woman left; he hoped he would have some peace." The witness thought she had such influence that she could have had any negro sold that she pleased.

At Christmas, 1835, Farr said he should not live long, and wanted to divide his property out among his relations, equally; Fan said, "what is to become of me and Henry?" Farr said he would give her money enough to maintain her during life, and she might go to a free State; she replied, "before any of the Farris should have any of the property she would lose her life." Fan refused to let a servant come to him when he called; they quarrelled about it—she shook her fist in his face and threatened to knock his teeth down his throat; witness heard them quarrel in the night; heard her call Hannah, a servant, to bring her the whip, and she'd beat his skin off.

They would get drunk together, and she was insolent to him; told him to hush, or she'd give him hell; cursed him for a damned rascal, rubbed her fist in his face and dared him to open his mouth; called him a damned old palsied rascal.

Farr once sent for Dawkins, and said Fan had tried to kill him with a spear; she threw it at him and it stuck in the bed post; Fan was drunk, and he made them make friends.—Another witness said, "Farr sent for him to come and see

him; when he came Fan was cursing tremendously; her sleeves were rolled up; she said, God damn—I'll see your heart's blood, for I caught you in bed with another man's wife. Witness would have beaten her, but Farr requested him not—said she was a damn fool any how, and he was a little afraid of her when she got into her tantrums; they were drinking. This was in 1832 or '33." At another time he said he did not know why he took up with Fan; when he was well and could go about, he did not mind her, but since he had been palsied, he had better be in hell.

The jury found against the will, reversing the judgment of the Ordinary, and the appellees moved for a new trial,—

On the ground of error upon several points touching the admission and rejection of evidence, (as will appear more fully by reference to the opinion of the Court.)

Because the will was proved to have been legally executed, and, as no proof was offered to shew that it was blank, that proposition should not have been submitted as a question to the jury.

Because the verdict was against the evidence, against the law, and against the expressed opinion of the presiding judge.

Curia, per EARLE, J. Although the first ground taken in the notice of appeal does not present the precise question made in the argument, nor cover the whole ground occupied by the counsel, yet enough is collected from the report of the Judge and the admissions of the bar to authorize the Court to consider and decide :

1st. Whether the plaintiffs's counsel should have been allowed to cross examine the witness Dawkins, as to former declarations made by him inconsistent with his oath in court, and then to call witnesses to prove those declarations.

2nd. Whether, after that evidence had been allowed, the other party, or the witness himself, should not have been permitted to sustain his oath in court, by proof of general good character.

The rules of evidence are generally well settled. They are the result of experience, and are framed for the purpose of eliciting truth in the most effectual manner, but also with a view to protect the witness from unnecessary assault. To secure parties from the consequences of falsehood, as well as to advance the ends of justice, it is necessary and proper that they should be allowed to attack the credibility of a witness called to testify against them; and there are three modes of doing this: 1st. by proof through other witnesses that the facts are otherwise; 2nd. by evidence of general bad character, which would render him unworthy of credit; or, 3rd. as Mr. Phillipps expresses it, (1 Phil. Ev. ch. 8,) "by proof that he has made statements out of court, on the same subject, contrary to what he swears at the trial."

As to the first of these modes, it is obvious that it may be resorted to without in the slightest degree impugning the veracity of the witness, so long as men view the same transaction in different lights, form different conclusions from the same premises, pay more or less attention to the same occurrences taking place before their eyes, and have memories more or less retentive. A party must be allowed to shew by witnesses called by himself, that facts are otherwise than as they are deposed by the witnesses called against him; and this, too, without being understood as so attacking the character of those adverse witnesses, as to let in evidence of general good character in reply. But it seems impossible to resort to either of the other modes without making a direct attack on the veracity and character of the witness. The proposition is direct, that he is unworthy of belief; from general infamy, in the one case, and in the other, that he either swears falsely on the trial, or was guilty of falsehood before. Such proof of former inconsistent declarations is always offered to discredit what the witness swears on the trial, and is held to be one of the most legitimate modes of doing so, as it is in fact one of the most common.

But, although this is perfectly reasonable and proper in regard to an adverse witness, it becomes another question when presented in regard to a party's own witness. The rule is universal, and founded in the strongest common sense and most rigid justice, that a party shall not be allowed to discredit his own witness, that is, to shew that his witness is not worthy of belief; and this is a rule which seems to be indispensable, not so much for the protection of the adverse party as of the witness himself. "It would," says Mr. Justice Buller, (N. P. 297,) "enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him."

It is true the meaning of this rule is restricted by Mr. Philipps to proof of such general bad character as would make him unworthy of credit, (1 Phil. Ev. 213, ch. 8,) and this view receives some countenance from the court in *Perry vs. Massey*, (1 Bailey, 32,) but the position is not sustained by any of the cases. No doubt when a party calls a witness who swears differently from what was expected, he is not precluded from relying on other proof by other witnesses that the fact is not as his first witness deposed, although this may indirectly have the effect of bringing in question the credit of such witness; and he may, perhaps, resort to the previous admissions of the same witness, provided such admissions would, of themselves, have been competent evidence of the fact, independently of the personal bearing of the examination. Such was clearly the case of *Alexander vs. Gibson*, before Lord Ellenborough, (2 Camp. R. 556;) and, in *Perry vs. Massey*, the admissibility of the evidence of previous contradictory acknowledgements was rested, by the counsel who offered it, on the very ground that "Weaver's agency was established, and his acknowledgement of payment was evidence in the cause, independently of any purpose to impeach Weaver's credit." It would be extremely harsh to allow a party calling a witness to go farther,

It seems in vain for counsel to disclaim the intention of impeaching the credit of Dawkins. He appeared to be a subscribing witness to the will. He was called to disprove the due execution of the will, or with the expectation that he would do so. He deposed differently, and proved the will to have been duly executed. The party who had called him had then a right, surely, to call other witnesses and prove the fact of non execution, or to make it appear in any other way by evidence that was originally competent. But here, counsel were allowed to prove that Dawkins had on several occasions made inconsistent statements; and, to open the way to this proof, as in the case of impeaching the credit of an adverse witness, he interrogated the witness himself, concerning these statements. It is enough to determine this question to ask whether the declarations of Dawkins out of court, would have been competent in the first instance, or whether, after they were admitted, they were competent as independent proof. Certainly not. They could therefore serve no other purpose than to throw suspicion and discredit on the evidence of Dawkins, delivered at the trial. They were to shew that his oath then was not entitled to credit, by convicting him of falsehood upon his former declarations.

Nor is it a sufficient answer to this reasoning, that the objection was waived by the adverse counsel. The rule is intended for the protection of the witness, and should not have been violated, even with the consent of the counsel.

If Dawkins had been the witness of the other party, and his testimony had been impeached as it was here, I think he should have been allowed to call witnesses to prove his good character. Such evidence, in its direct tendency, is calculated to shew that the witness is not worthy of credit. It is an assertion of his having spoken or sworn falsely, and his good character is a legitimate defence against the presumption that is raised against him. In *Rex vs. Clarke*, (2 Stark. R. 214,) before Holroyd, J. such evidence was allowed. There, the

character of the witness for the prosecution was impeached on her cross-examination, as to her conduct and deportment, and she was permitted to call witnesses to her good character. "Since," said Holroyd, J. "the object of the cross-examination was to impeach the character of the witness, and to shew that she was not credible. I do not see why such evidence may not be let in for the purpose of removing the impeachment of her character upon cross-examination, as well as if it had arisen *aliunde*."

Nor can it make any difference that the witness was called by the party impeaching him. If the protection he was entitled to was withheld from him, it was due to him as a personal right to be permitted to sustain himself.

Independently of these errors in law, the Court is of opinion that this verdict ought not to stand; that it is not only opposed to the great preponderance of evidence, but that there is, in fact, in the whole report of the case, no proof of such undue and improper influence as should be allowed to invalidate a will. This phrase of *undue influence*, so frequently resorted to in this country, by disappointed relations, to avoid wills of persons on whom, while living, they had no claims, seems to me to be a modern innovation, and is not known in the English Courts. Every person of reasonable mind and sane memory may dispose of his property by will. It is a right secured by the municipal law, and exists in as perfect form as the right to transfer by sale or gift during life. The true inquiry always is, whether there exists the *animus testandi*; for, without that, the instrument purporting to be a will is of no effect in law. The party, therefore, must be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man. Even in case of such constraint or fear, if, when they are over, the testator confirms the will, it is made good. So likewise, wills procured to be made by artful misrepresentations and fraudulent contrivances, are void. But it is not unlawful for

a man, by honest intercessions and modest persuasions, to procure a will to be made in his behalf; and, according to the ecclesiastical law, importunity, in its legal acceptation, must be such as the testator is too weak to resist, and pressed upon him even to such a degree as to take away his free agency. These are the general rules on this subject; and, if they be applied to the case made by the proof, it will be very difficult to find the evidence either of threat, or violence, of fear, or compulsion, or artful misrepresentation, or fraudulent contrivance, of immodest flattery joined unto deceit, or of excessive importunity, extorting from the feebleness of age or disease, what it was unwilling to grant, yet unable to withhold.

The testator was an intelligent man, of strong mind, not yet greatly advanced in years, and only impaired in the vigour of his understanding by intemperance. He had no lawful wife, nor children, and had not lived in amity, at least not in continued amity, with his relations; and he has given his property to a stranger to his blood. This he surely had a right to do, and this is all that appears upon the face of the will.

When the executor and sole legatee proposes to produce the paper which contains the trusts, it is excluded, even by those who, in the argument to the jury, and to this Court, have urged that the will had ulterior and unworthy objects, and was made under the undue influence of a slave. We cannot, however, avoid seeing, through the face of the will, that the purpose was to provide a mode of bestowing the property on the issue of an illicit intercourse between that slave and himself. We do not choose here to speak of the indecency of such a connection, nor of the policy of permitting property to be given or devised in trust for the benefit of such persons. Until the Legislature thinks fit to interfere, we must have questions of this sort determined by the established rules of law.

Now, what facts, if proved, shall constitute undue or improper influence to avoid a will, I hold to be a question of law; and I think, in cases of this kind, the particular sort of influence should be set down in the pleadings. That the testator was to a considerable extent under the influence of the woman in his domestic arrangements, is undeniable—as much, said one witness, as a man usually is under the influence of his lawful wife; yet it would not hold either with reason or law, to say that such an influence would avoid a will in behalf of the wife. Testator and the woman often quarrelled; she threatened to knock his teeth down his throat, cursed him for an old palsied rascal, rubbed her fist in his face, and dared him to open his mouth. These occurrences were during the paroxysms of mutual drunkenness, and really seem to be any thing but flattering speeches, or deceitful representations, or excessive importunity, used for the purpose of procuring a will to be made in behalf of her son. Indeed, all the proof of this kind referred to the year 1835, while the fact was that, as early as 1828, the testator had made a disposition of his property for precisely the same purpose, only appointing another executor. And this disposition of it was in conformity with the uniform tenor of his declarations from that period to the time of making the will under consideration. A disposition of property, though ever so capricious or unreasonable, will not be avoided on that ground alone. It is no lawful objection to a will that it does not dispense the testator's property to his relations, especially remote ones, unless deceitful arts have been used to estrange fixed affections. There is nothing of that kind here, and, however indecent and degrading was the connection of the testator with his slave, yet as he had issue by her, whose appearance seemed such as to secure him a *status* in society in another State, which he could not gain here, it is not perceived that there was any thing unreasonable or unworthy in making such a disposition of his property as to promote that end.

After all, whatever sort of influence is alledged, to avoid a will, must appear to have been exerted for the purpose of procuring it to be made. Now there is not in this case any proof, except by Ellen Brock, that the woman Fan had any direct communication with the testator, on the subject of the mode of bestowing his property. "She said, before any of the Farris should have any of the property, she would lose her life." This was in 1835, and, besides that the will in Judge O'Neill's hands was then made, it was no threat of violence to the testator to put him in fear: it was not the exercise of any of the arts alluded to, which may avoid a will; but only a strong expression of her dislike, and even that was after an expression of the testator's intention in her favour, proved by the same witness.

Upon the whole, the Court is of opinion, notwithstanding the learned and able argument of the counsel for the appellees, that to allow this verdict to stand would be, to let the jury run wild under the influence of prejudices and feelings which, however honorable and praiseworthy, must not be permitted to overthrow the rules of law, or divert the current of justice. The trial by jury would otherwise become an engine of capricious injustice, instead of the safe-guard of property. The motion for new trial is granted, with the unanimous consent of the Court.

O'NEALL, J. declined expressing an opinion in this case.

Thomson & Dawkins for the motion; *Herndon & Henry*, contra.

Edmund Kenedy and Wife vs. John Cunningham and M. Childs.

The note of plaintiff, payable to *one* of two joint defendants, was not allowed in discount to an action on their joint note.

"To an action by two persons, the defendant cannot set off a debt due to him from one of them, nor can one of several joint defendants set off a debt due to him alone from the plaintiff."

Before EARLE, J. at Abbeville, Fall Term, 1839.

Sum. Pro. on a joint note; to which the plaintiff's note to one of the defendants, on a separate demand, was offered in discount and allowed.

The plaintiff moved the Court of Appeals to rescind so much of the circuit decree as admitted the discount.

Curia, per BUTLER, J. The question here made is, can one, of two or more joint defendants, set off a separate demand due to him from the plaintiff. The authorities are very clear that a single defendant cannot set off a demand due to himself from one of a number of joint plaintiffs. It has been expressly decided in this State that, where partners sue an individual, the demand of that individual against one of the partners cannot be set off. (*Powrie vs. Fletcher*, 2 Bay R. 146; *Lovel vs. Whitridge*, 1 M'Cord, 7.) This proceeds on the ground that the plaintiffs, as partners, had no contract with the defendant. One of the plaintiffs having made the contract, he must keep it according to its merits; for, if the plaintiffs could be defeated by such a demand, they would have to make their co-partner their debtor for the debt and costs which they were compelled to pay for him.

The defence of set off did not exist at common law, but has been allowed by, and depends on, statutory provisions; and, as a general rule, it may be laid down, that it cannot avail where there is wanting a mutuality of contract or dealing between the parties to the record. Although the debt sought to

be recovered, and that intended to be set off, need not be of the same nature or degree, to entitle a party to avail himself of this defence, yet it is necessary that they should be mutual and due in the same right. In the case of *Fletcher vs. Dyche*, (2 Term R. 323—7,) Buller, J. in noticing an exception by counsel, seems to take it for granted that, where plaintiffs sue on a joint demand, a defendant cannot set off a separate demand against one of them, because there was not a mutuality of contract. He says, "the plaintiff's counsel objected to the set off because there was no mutuality:—but that depends on the question, whether the debt is due from the plaintiff and another person, or from the plaintiff *alone*. If the former, the debt cannot be set off."

The same principles are equally applicable to joint defendants. If one joint defendant could set off a demand due from a single plaintiff, he could defeat the plaintiff's demand by a contract which the plaintiff had never made with the parties to the record. Success would enable the defendant, who pleaded the discount, to defeat one person by making others his creditors; for he would have a right to look to his co-defendants for remuneration for paying their debt if they had been jointly liable with him. But, taking another view, suppose that the defendant, setting up the discount, makes an issue which results, by failure, in costs and expenses beyond those otherwise incident to the action. Who are to pay them? Not that defendant alone, but *all* are subjected to the costs of the suit.

Our discount law recognizes the defendant pleading a discount, as occupying the position of a plaintiff, and gives him the right to recover any excess which he may establish beyond the plaintiff's demand. In this respect it is peculiar, and distinguishable from the English statute on the same subject. A., by pleading a discount, might enable B. and C. to recover a judgment against D., who never had had dealings with them.

The rule, analyzed and reduced to simplicity, is this;— to an action by two persons, the defendant cannot set off a debt due to him from one of them; nor can one of several joint defendants set off a debt due to him alone from the plaintiff.

According to these views, the circuit decision must be reversed, and the plaintiff be allowed to take a decree for the whole of his note.

The whole Court concurred.

Wilson & Martin, for the motion; *Wardlaw & Perrin* contra.

Geoffrey Palmer vs. M. B. Bogan.

The foreman of the jury in a slander case, who had used like words of the plaintiff to those on which the action was brought, was excused, against the defendant's consent, from sitting on the trial; and the defendant was not permitted, for that reason, to continue the cause.

Before O'NEALL, J. at Union, Fall Term, 1839.

This was an action of slander, in which the parties had expressed their readiness to go to trial, when the foreman, at the suggestion of the plaintiff's counsel, asked leave to retire from the jury, alledging that he had himself made a charge against the plaintiff similar to that which was the cause of the present action. The presiding Judge granted the leave, notwithstanding the vehement protestation of the defendant's counsel. The defendant then desired to continue the cause; but no motion was made to that effect, as the Court signified that it would not be allowed without the usual affidavits.

The verdict went for the plaintiff, and an appeal was taken, among other grounds,

Because the foreman had been excluded from the jury without the defendant's consent.

And because the defendant had not been allowed, on this account, to continue.

Curia, per O'NEALL, J. said, "we are satisfied that the judge below exercised a proper discretion in excusing the foreman of the jury, and in ordering the case on to trial."

AT CHARLESTON, FEBRUARY, 1840.

JUDGES PRESENT.

HON. R. GANTT,
HON. J. S. RICHARDSON,*
HON. J. B. O'NEALL,
HON. B. J. EARLE,
HON. A. P. BUTLER.

W. H. Macfarlane vs. Levy P. Moses.

The holder, in his action against the acceptor of a bill of exchange, failing to prove the hand-writing of the first indorser, was non-suited.

Before EARLE, J. at Charleston, Spring Term, 1839.

This was an action on a bill of exchange, drawn at Vicksburg, by one Moore, in favor of Wm. J. Day, at six months, and accepted by the defendant, who, on the maturity of the acceptance, refused to pay the bill. The name of Wm. J. Day was indorsed, but there was no evidence that the indorsement was made by him; and the only proof offered of the plaintiff's right to the bill was, that it had been sent by him to Charles M. Furman, Esq., to be collected; that Mr. Furman, as agent of the plaintiff, called, with the bill, on the defendant, who accepted it. The defendant's motion for a

*During part of the Term.

non-suit was refused, and the jury, under the instruction of the court, found for the plaintiff.

The defendant appealed, renewing his motion for a non-suit, and, in the event of that failing, moved also for a new trial, on the ground, that

The plaintiff ought to have proved the indorsement, to establish his property in the bill.

Curia, per BUTLER, J. The liability of an acceptor to pay a bill drawn to order, is to be distinguished from the right of one who presents it to receive payment. When a bill is presented for acceptance, the acceptor looks alone to the handwriting of the drawer, which he cannot afterwards dispute, but the holder's title depends on the order of the payee, and his handwriting must be proved to entitle the holder to receive payment.

In the case of *Smith vs. Chester*, (1 T. R. 654,) it was expressly ruled, that in an action against the acceptor of a bill of exchange, it is necessary to prove the handwriting of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. The case in *Sayer*, (p. 223,) relied on by the counsel for the plaintiff in this case, in which it was supposed that Lord Mansfield had held a contrary opinion, was commented on and considered by the Court in the case of *Smith vs. Chester*. The Judges there remark that the subject had been fully discussed and the law well settled; and the uniform current of decisions has conformed to the case last quoted.

The defendant, in strictness, was entitled to a non-suit; but, to prevent further delay and litigation, which would be the consequences of another action, the Court has thought it advisable to grant a new trial.

RICHARDSON, O'NEALL and EARLE, JJ. concurred.

Phillips, for the motion; *Bailey & Brewster*, contra.

Commissioners of the Orphan House of the City of Charleston vs. Wm. Magill.

An assignment, by Orphan House Commissioners, of the indentures of an apprentice, did not imply a covenant that the apprentice should perform the stipulations contained in them.

And to an action by the Commissioners against the assignee, upon a covenant by the latter, to pay certain liquidated damages, in case of dismissing the apprentice before the expiration of her term, the assignee shall not set up in defence the apprentice's non-performance of her stipulations in the indentures.

Before GANTT, J. at Georgetown, Fall Term, 1839.

Sum. Pro. against the assignee of the indentures of an apprentice, Ann Delany, who had bound herself "as an apprentice for education," to the plaintiffs, "to dwell and continue in the said Orphan House, &c.—and from thence to dwell &c., with such person as the said indentures might be transferred to, until &c. And during the term aforesaid, the said Ann Delany to demean herself agreeably to the rules, &c. until the indentures are transferred; and, from thence, the person to whom such transfer is made, well and faithfully to serve, &c.—in all things well and faithfully to demean herself, &c."

To the defendant were assigned "the foregoing indentures, and all right, title, duty and term of her service" of the plaintiffs in and to the said Ann. Besides the usual stipulations in favour of the apprentice, there was a covenant by the assignee, to pay "the sum of sixty dollars, as liquidated damages," in case of her dismissal before the end of the term.

This action was brought for the sixty dollars, and was tried before a jury. The apprentice appeared to have been dismissed on account of immoral behaviour; and the Court said, "that this was a good defence, and that the Commissioners, by assigning the indentures, covenanted for the performance by the apprentice, of all the stipulations contained

in them, and that on this depended the plaintiff's right to recover." Verdict for defendant.

The plaintiffs appealed for error in the Judge's charge, and on other grounds, the consideration of which was superseded by the decision of the Court upon this.

Curia, per RICHARDSON, J. Dr. Magill bound himself to pay sixty dollars, in case he should dismiss his apprentice, or return her before the end of her term, to the Commissioners of the Orphan House, without their consent. The defence admits that the Doctor did dismiss his apprentice, but did so because she was disobedient and vicious, and urges that the dismissal was therefore justifiable. The rejoinder to such defence is, that no matter what was the vicious conduct of the apprentice, Dr. Magill undertook, as master, to restrain or correct her misconduct, had lawful authority to do so, and if he failed of success, and dismissed her on that account, such dismissal presents an infraction of the contract—the reason why a certain sum in the nature of liquidated damages was fixed and agreed upon in lieu of uncertain damages, was, to prevent dispute in that very event.

The question between the parties is upon the strict legal construction of a contract of small amount, but involving important principles. If Dr. Magill had dismissed his apprentice even cruelly and wantonly, he would have had to pay but sixty dollars. And so on the other hand, if he failed to restrain her misbehaviour, and dismissed her for misconduct, however great, his penalty is the same. His literal covenant is to pay that sum if she should be dismissed. But turn to the cause, motive, or end of the whole contract. The consideration for which Dr. Magill laid himself under such a penalty to the Commissioners of the Orphan House, was not that the apprentice should conduct herself orderly;—that depended upon the apprentice herself, and was made the duty of the Doctor so to require, from the moment he was

made master of one short of the age of legal discretion. The true consideration evidently was, that the Doctor was made the master of the apprentice, with all the rights, duties and advantages of a master, according to the laws of the State. Such assuredly was the warranty on the part of the Commissioners; in consideration of which warranty of the rights of a master, the Doctor laid himself under the penalty if he should dismiss or return the apprentice before the end of her term. It is the duty of every master to persevere, and strive to correct and improve his apprentice *throughout* the whole term of service. When the Doctor yielded to her perverseness, and dismissed his froward pupil, he himself failed in his primary undertaking, and disappointed the end and motive of the Commissioners, and he cannot convert his own failure, whatever was the immoral conduct of his apprentice, into a legal defence against his covenant to pay a forfeit stipulated and agreed upon, in the event of his dismissing the apprentice at all. It follows then, rationally and satisfactorily, as well as from the letter of his contract to pay certain liquidated damages, that the Doctor entered into an independent covenant with the Commissioners, in no way bottomed upon any warranty for the good behaviour of Ann Delany—but in consideration of the assignment made to him of the rights of a master. This assignment and the Doctor's covenant to pay sixty dollars in a certain event, were reciprocal considerations, each for the other.

If it be asked, is there no way for the master of a vicious apprentice to get rid of his contract, the answer is found in the Act of 1740 and that of 1789, (P. L. p. 176 and 478.) These Acts provide that either the master or his apprentice may make complaint before two Justices of the Peace or a Judge, who may discharge the apprentice for sufficient cause. This has been adjudged in the case of *Belcher and wife* ads. *Commissioners of the Orphan House*, (2 M'Cord R. 24.) But to do so, requires a judicial trial, in which both parties are to

be heard, and neither party is competent to dissolve the contract upon his own mere motion.

A new trial is therefore granted.

EARLE and O'NEALL, JJ. concurred.

GANTT, J. dissenting. In this case, the construction which was given to the covenant in question, was according to what appeared to be the obvious intention of the parties, as collected from the whole context of the several instruments before me. On the part of the plaintiffs, it became necessary to introduce certain letters of the defendant, Dr. Magill, to shew that he had returned the apprentice to the Orphan House, contrary to the covenant entered into by him. In these letters, the defendant states particularly the reasons why he could no longer consent that she should remain with him, and they go to shew very clearly that the apprentice had violated, on her part, the stipulations in the articles of apprenticeship entered into by her with the Commissioners, and assigned by them to Dr. Magill. Had there been the slightest evidence to shew that the defendant had been guilty of any neglect in the discharge of his duty as the master of the apprentice, I should have promptly decreed against him, and from the possibility that this might have been the case, I thought it best to submit the matter to the jury, who better knew the parties than the presiding Judge, and could therefore better adjudge respecting the credit which should attach to the evidence offered. I thought that if the defendant was not in fault, but had used the necessary endeavours to fulfil his duty towards the apprentice, and that the improper conduct of the apprentice had alone put it out of his power, there was no reason why the plaintiffs should recover the stipulated damages. This opinion was fully expressed to the jury, who found for the defendant, and I can see no reason why the verdict should be set aside.

Bailey, for the motion ; *Harllee*, contra.

John Manning vs. S. Watson, survivor of S. & J. Watson.

Damage *in transitu* is a good set-off to an action for freight.

And delivery to, and acceptance by the consignee, does not alter the case. (*Semble.*)

Any demand of the defendant, arising *ex contractu*, may be pleaded in discount; but not damages *ex delicto*.

Before the HONORABLE THE RECORDER of the City Court of Charleston, November Term, 1839.

Assumpsit for freight; to which was pleaded a discount for damage to the goods by leakage of the ship. The damage was not discovered till after the goods, which had been delivered apparently in good order, were unpacked. The jury found for the defendant's discount, and thereby established a considerable balance in his favour.

The plaintiff appealed, by motion for a new trial, on the ground,

"That the amount of damage alledged to be sustained by goods in their carriage is inadmissible as a set-off in an action for freight, after delivery of the goods to, and acceptance of them by, the consignee."

Curia, per O'NEALL, J. The plaintiff's motion is concluded by the case of *Ewart vs. Kerr*, (Rice R. 203.) But, apart from that authority, there could not be a doubt of the defendant's discount being a proper one. It has long been the practice to allow the injury done to goods in transportation to be set off against the claim for freight. The defendant's cross demand arises *ex contractu*, and, as such, may always be set up in discount under our law, (P. L. 246; 4 Stat. So. Ca. 76,) which admits "any account, reckoning, demand, cause, matter, or thing." If the damages arise *ex delicto*, they cannot be so set-off; and this distinction, if kept

in mind, will prevent the profession from supposing that there is any conflict between the case of *Ewart vs. Kerr* and that of *Johnson vs. Wideman*, (Rice R. 325.)

GANTT, RICHARDSON, EARLE, and BUTLER, JJ. concurred.

Yeadon & Macbeth for the motion; *Walker*, contra.

A. S. Marvin vs. Colin McRae, survivor of C. McRae & Co.

The general count for money had and received, in an action brought upon an interest-bearing demand, carried interest.

"It was not necessary to count upon the interest, for it is an incident of money had and received, and does not depend upon an express promise."

Before EVANS, J. at Marion, ——— Term, 1839.

This was an assumpsit, which went to the jury upon the general count, for money had and received, a special count having been overruled on demurrer at a previous term, and the Court of Appeals having determined that, upon this general count, the plaintiff might recover. (See the case in Rice R. 171.) The following statement, upon which the case was now brought up, is extracted from the report of the circuit Judge upon the former appeal.

"Mr. Cohen was the only witness, and deposed that Colin McRae and George C. Brown, composed the firm of Colin McRae & Co. Brown was arrested in the Federal Court, at the suit of the plaintiff, for a large amount, and transferred to the witness, as the agent of Marvin, many notes, and among them the note which was the subject of this suit, given by C. McRae & Co. to George C. Brown himself. Shortly afterwards, and before it became due, Mr. Cohen saw McRae and

informed him that he held this note, and also of the circumstances under which he held it and had obtained it. McRae replied, "that in the settlement of the concern of McRae & Co. he would retain money enough to pay the note." Cohen saw him frequently, and he repeatedly made the same promise. On the 17th March, 1835, after the death of Brown, saw him, and asked him for the money. He replied, that he had settled with Brown, and told him that he (McRae) must retain money to pay this debt. Brown had said, "never mind, allow me to take the money and I will pay the note," and he, McRae, had permitted Brown to do so. The witness stated that he was induced entirely by the promises of McRae not to proceed against Brown, from whom he might have collected the money. The note was for \$338, dated Jan. 9, 1831, signed C. McRae & Co., payable to George C. Brown or order, at sixty days, and not indorsed."

The jury found for the amount of the note, with interest from the settlement between McRae and Brown, in 1833.

The defendant, upon appeal, moved to review the former decision of the appeal court; as well as for a new trial, on the ground,

That the plaintiff ought not to have recovered interest, or damages in lieu of interest, on a general count for money had and received.

Curia, per O'NEALL, J. The well considered opinion of this Court, to be found in Rice's Rep. 171, decided that the plaintiff was entitled to recover. We do not think that we ought to yield to the application to review that decision. The only question which is now to be considered is, whether the plaintiff is entitled to recover interest on the count for money had and received. I have no doubt he is. It was so ruled in *Bulow vs. Goddard*, (1 N. & M'C. R. 45;) *Barrelli, Torre & Co. vs. Brown & Moses*, (1 M'C. R. 449.) It is true, that in the first of these cases, the right was put upon the ground

of the defendant having forced the plaintiff to pay him money which he was not entitled to receive. In the other no qualification was suggested; though, as it was not necessary to the decision of that case, I concede that it is not conclusive authority. But I think the rule there stated has been ever since followed. If, however, there never had been a decision upon the subject, there could not be room for a well founded doubt about it. The use of money is always worth the legal rate of interest. He who receives the money of another, is to be regarded as using it, unless it appears that he received it under such a character or in such a way that he could not use it without violating his duty. He who receives the money of another without any right to retain it, will not be supposed to keep it without putting it to use. The fact of the party being deprived of that which would produce interest, generally entitles him to demand it. It is so in all cases of contract, where payment of a certain sum is delayed after a time limited by writing. In the action for money had and received, the defendant is considered as in the actual use of the plaintiff's money until the contrary appears. The use of it establishes the plaintiff's right to interest; and it is perfectly immaterial whether a legal implication or express evidence establishes the conclusion that the defendant is in the use of it. This action likewise proceeds upon the notion that the defendant withholds from the plaintiff money to which he is entitled. In either of these points of view, the plaintiff is clearly entitled to interest.

In the case before us, there is still less difficulty, for the demand of the plaintiff against the defendant and Brown was an interest-bearing demand. When he made himself liable for its amount, he took it with all its consequences; and in parting with the fund out of which he had promised to pay it, he deprived the plaintiff of the use of that which would have produced interest to him.

It was not necessary to count upon the interest, for it is an

incident of money had and received, and does not depend upon an express promise. Where interest is sought to be recovered upon a book account, its recovery depends upon a promise in fact, and it is, for that reason, necessary to declare on such promise.

Motion dismissed; GANTT, RICHARDSON, EARLE and BUTLER, JJ. concurring.

Munro for the motion.

W. Macfarland vs. Allen N. Dean.

The declaration averred an assault on the plaintiff "while sitting in his gig." The replication represented the defendant in the gig, "and the plaintiff gently laid hands on him to put him out," and then the assault:—held not to be a departure; for both allegations, though apparently discrepant, might be true, as they did not necessarily refer to the same exact point of time.

Plea to assault and battery, *son assault demesne*; which the replication confessed and avoided. The rejoinder substantially reiterated the plea, and was held bad for not traversing the replication.

Approved precedents are to be followed, and a rejoinder wantonly deviating therefrom, held bad.

The effect of a judgement in special demurrer is, only, that the party cast shall plead over or amend on payment of costs; so, his demurrer having been overruled, to a rejoinder concluding to the country, he should be allowed to add the similitur and go to trial.

"I am not prepared to hold that a judgment for the defendant in demurrer as to one count in the declaration, would deprive the party of a right to judgment on a verdict found on the other counts."—(*O'Neill, J.*)

Before BUTLER, J. at Coosawhatchie, Fall Term, 1839.

This case came up to the Appeal Court on a demurrer to the plaintiff's rejoinder, which was over-ruled in the court below. Its history is very fully detailed in the opinion of the Court.

Curia, per O'NEALL, J. The plaintiff declared first, for an assault and battery committed by the defendant upon him, while sitting in his gig or chaise, by leaping upon the shaft, breaking it off, and beating and wounding him therewith, and special damages; 2nd. for a beating and wounding generally, with special damages; 3rd. for beating and wounding generally; 4th. for breaking the plaintiff's gig. To this declaration the defendant pleaded the general issue, and to the first count, *son assault demesne*. To the general issue, the plaintiff added the similitur; to *son assault demesne*, he replied specially, confessing the first assault, but avoiding it by stating, that the defendant was in the said gig or chaise of the plaintiff, making a great noise; and the plaintiff, upon his refusing to leave it after request made, gently laid his hands upon him to expel him, as he lawfully might, and that this is the assault pleaded; and then the plaintiff alledged a beating and wounding by the defendant, as in the first count, and averred that the same was outrageous and excessive. To this the defendant rejoined as follows.

“And the said Allen N. says, that the said plaintiff, on the day and year, and at the place above mentioned, made an assault upon the said Allen N. with an intent to beat and wound him as he has above alledged, and of this he puts himself upon the country.” To this the plaintiff demurred, and assigned for cause of demurrer, 1st. that the rejoinder did not, by apt and proper words, refer to the replication; 2nd. that it did not answer or deny the replication; 3rd. that it departed from it; 4th. that the rejoinder was not certain, direct and positive; 5th. that it was otherwise informal and defective. The defendant joined in demurrer, and the court below overruled it.

The plaintiff then went to trial on the other counts, the Court instructing him that, if a case was not made out, upon them, differing from that set out in the first count, the judgment for the defendant in demurrer, would preclude a recovery.

The jury found a verdict, on evidence which the presiding judge thought was strictly applicable to the first count, for \$300 damages; notwithstanding which, judgment of *nil capiat* was given in favor of the defendant.

The plaintiff appeals, and insists that the judgment below was erroneous; and, even if that was right, that yet he was entitled to have judgment for his damages found by the jury.

I have bestowed a good deal of reflection on these pleadings, and think the plaintiff's replication good, and the defendant's rejoinder bad. The replication is in exact conformity with a precedent in 2 Chitty plead. 691. In 1 Chitt. plead. 563, the rule is stated, "if the plea be true, the plaintiff must reply specially the matter in avoidance of it;" and it is said, "if the battery was outrageous, or more than was necessary for self defence, the matter should be so replied." These rules are complied with on the present occasion. The only plausible pretence that it is defective, is that it states as the cause of the plaintiff's assault a matter different from that stated in the first count. In it the plaintiff is represented as sitting in the gig when the defendant made the assault—in the replication, the defendant is represented as being in the gig, making a great noise, &c. This might be a departure, if both statements could not stand together. But they admit of this construction; that the plaintiff was seated in the gig when the defendant intruded himself into it, making a great noise, &c., and would not leave it after request; and then, that the plaintiff, laying his hands upon him, put him out, upon which the defendant leaped upon the shaft, broke it, and beat the plaintiff. This makes the replication fortify and support the declaration.

The rejoinder is defective, as it does not refer by apt and proper words to the replication. The form is given in 2nd. Chitt. plead. 718, and approved precedents in pleading are to be followed. It was defective too in not traversing the facts stated in avoidance of the plea of *son assault demesne*.

It is, if it alledges any thing properly, a mere reiteration of the plea, and cannot therefore be an answer to that which confesses and avoids it. I am, therefore, satisfied that the judgment below ought to have been in favor of the plaintiff in demurrer.

But if it was properly given for the defendant, still it was not a final judgment which could bar the plaintiff's recovery. A judgment in special demurrer is nothing more than that the party against whom it is pronounced should plead over or amend on payment of costs; so here the effect of it was to hold the rejoinder good, which had concluded to the country—and then the plaintiff ought to have been permitted to add the similiter. On looking at the record, I find the similiter to the rejoinder is added, and therefore the record is perfect and the plaintiff is entitled to his judgment. I am, however, not prepared to hold with the judge below, that a judgment for the defendant in demurrer, as to one count in the declaration, would deprive the party of a right to judgment on a verdict found on the other counts.

The annotations of the learned editor of Saunder's Reports, 1 Saun. 80, note 1, (*Lowe vs. King*), does not justify that conclusion. In it, it will be remarked, that although he speaks of different issues, yet, he intends to speak of issues made up on several pleas to the whole case: and not when there is a plea to one count, and another plea to the whole case. In *Cook vs. Sayer*, (2 Burr. 749,) the general issue and statute of limitations were pleaded: verdict went for the plaintiffs on the general issue, and judgment for the defendant in demurrer on the statute. It was held very properly that, notwithstanding the verdict, the plaintiff was barred by the statute, and judgment of *nil capiat* was awarded. But this is not the case here. The plaintiff may, for aught that appears on the record, be barred upon the first count, and still be entitled to judgment on the others. *Son assault demesne* could not justify the breaking of the plaintiff's gig, of which the 4th count complains.

The motion to reverse the decision below is granted, and the plaintiff has leave to enter up judgment for his damages found by the verdict.

GANTT, RICHARDSON and EARLE, JJ. concurred.

Martin for the motion.

The following outline of his argument was kindly furnished by the appellant's counsel; but the peculiar form in which the case is reported, leaves no place for it except as a note.

"The rejoinder is defective in form, (3 Chit. Plead. 1232,) and therefore bad (Com. Dig. Abatement G. 1; 1 H. Blk. R. 1; 1 Bos. & Pul. ; 5 East 272; 3 Barn. & Ald. 448; 6 East 272; Gould's Plead. 466,) on *special demurrer*. (1 N. & M'C. 171.)

"It does not completely answer the replication, *which it ought to do*, (3 Tom. Law. Dic. 122; 4 Com. Dig. pleader; Id. Ibid. E. 1; 1 Saund. R. 28, note 3; 4 Saund. R. 62,) but departs therefrom, inasmuch as "the party deserts the ground that he took in his antecedent pleading, [*son assault demesne*,] and resorts to another," [a general assault without any specification of its nature,] (Co. Lit. 304; 2 Saund. 84,) as well as, also, that "he puts the same facts on a new ground in point of law." (2 Saund. 408.) It is also vague and indefinite in the description of the trespass.

"But the rejoinder went only to the first count, and the plaintiff had a right to what he could prove under the rest; and at any rate, he should have been allowed to plead *de novo* on payment of costs. (1 N. & M'C. R. 64.)"

Henry B. Toomer vs. Thomas O. Dawson.

An entry in a broker's sale book, with the consent of both parties, of the terms of an agreement for the sale of land, if not in itself a sufficient memorandum under the statute of frauds, may be so connected with a subsequent letter from the vendor, in reference to it, as to make it good against him.

"I am, however, far from conceding that the memorandum made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both."—(*Butler, J.*)

Before O'NEALL, J. at Charleston, January Term, 1840.

This was an action of assumpsit, against the purchaser, on a contract for the sale and purchase of a plantation.

The plaintiff and the defendant met, on the 28th November, 1838, at the office of Elliott & Condy, who had been employed by the plaintiff to make the sale of the property in question. Mr. Elliott, at the plaintiff's request, who dictated the terms, and in the presence of the defendant, who saw it done, made the following entry upon his sale book.

H. B. TOOMER.	Plantation in St. Andrews Parish, \$7,000. Titles 1st. January.	T. O. DAWSON. 28th.
	Commissions,	Terms, $\frac{1}{2}$ payable 1st.
	Advertising,	July—balance in 1, 2
	Papers,	7 15 and 3 years.
		20

On the 20th December, the defendant wrote the following letter to the plaintiff:

"Dear Henry,—I have seen my cousin, and he thinks there are objections to your title: and I now inform you, that I expect you on the first of January next, to deliver me possession of the plantation, and at the same time to furnish me with good titles, and that I will be ready to comply with my part of the contract. Should you fail to comply with your part of the contract at the above mentioned time, I shall not hold myself bound by the agreement entered into.

Yours, &c.

T. O. DAWSON."

On the part of the defence, it was insisted that this was not a sufficient contract under the Statute of Frauds; and, upon a verdict being found for the plaintiff, the defendant appealed on that ground.

Curia, per BUTLER, J. Both parties were present when the entry was made. The plaintiff stated the terms of the contract in the presence of the defendant, and they were entered in the book accordingly. The terms were specifically

set down in writing, by the tacit consent of the defendant, and the express direction of the plaintiff, by a third person, in books kept by him for the purpose of transferring property from one person to another, or rather, for entering the terms of contracts on which sales were to be perfected. Such an entry, therefore, must be regarded, at least, as a memorandum in writing; and, if the party to be charged, subsequently refer to it, by letter or other writing, as a contract, he adopts it, and subjects himself to all the liabilities that such a contract would have imposed upon him if he had signed it when first made.

The case of *Saunderson vs. Jackson et al.* (2 Bos. & Pul. 238,) is full to the point. The plaintiff had bargained with the defendants for some gin which the latter refused to deliver. The plaintiff had received from them the following bill of parcels. "London.—Bought of *Jackson & Hankin*, distillers, No. 8, Oxford-street," (so much in print—then followed, in writing,) "1,000 gallons of gin, 1 in 5. Gin 7s. 350l." About a month after, the defendant wrote this letter. "Sir: We wish to know what time we shall send a part of your order, and shall be obliged for a little time for the delivery of the remainder." Lord Eldon, Ch. J. said, "this bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the Statute of Frauds. The single question therefore is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name. At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds. For, although it be admitted that the letter, which does not contain the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something that is, and the letter is signed by the defendants, there is then a written note, or memorandum in writing," &c. The case under consideration

cannot in principle be distinguished from the above. On the 20th December, the defendant wrote a letter to the plaintiff, referring to a contract that had been made; and the jury, by their finding, have connected it with the memorandum in the books of Elliott & Condry, which sets out the terms of the contract. So that, even allowing that neither the memorandum itself, nor the letter, separately, would have been sufficient, yet they were so when taken together.

I am, however, far from conceding that the memorandum made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both; but it is unnecessary to go so far to decide the point involved in this case. For authorities upon it, see 4 Bos. & Pul. 252, and 5 Harris & Johnson R. 117.

Motion dismissed; O'NEALL and EARLE, JJ. concurring; GANTT, J. dissenting.

Bailey for the motion; *Grimke*, contra.

David Seastrunk, Pay-master 18th Regiment vs. Henry W. Rice, Sheriff of Colleton District.

Where a militia execution (under the A. A. 1835, p. 18,) directed the Sheriff to levy a certain *percentage* on the general tax of the delinquent, the Sheriff was bound to ascertain the amount and collect it.

The Sheriff is not entitled to any fee on a militia execution, under the A. A. 1835, except where the fine has been collected.

So determined by BUTLER, J. at *Walterboro'*, *Fall Term*, 1839, upon a rule, calling upon the Sheriff to shew cause why he had not collected and paid over certain militia fines embraced in three executions issued by the Colonel of the 18th

Regiment. The Sheriff returned that he had collected on said executions the sum of \$33 50, but claimed to retain this amount, to pay costs, which the 18th Regiment owed him for cases sent out, and returned *non est inventus*, or remitted by the Colonel. This return was objected to—1st. Because the Sheriff has no right to retain money collected, to pay costs not on the face of the execution. 2nd. Because the executions above mentioned, direct the Sheriff to collect 20, and in some cases 50, per cent. on the general taxes of the persons fined, which the Sheriff had failed to do, contending, that he was not required, by law, to ascertain the amount of taxes paid by persons fined; and to sustain this position, relied on Sec. 10 A. A. 1813, (p. 9,) and 3d Sec. A. A. 1809, (p. 35.) To this, it was replied, that the Act of 1835, page 19, Sec. 3, prescribes the precise manner in which the execution shall be drawn, deprives the Court Martial of the power of fixing the amount of assessment, and leaves this duty solely for the Sheriff to perform.

The objections to the return were sustained, and the rule was made absolute. The sheriff moved the Court of Appeals to set aside the rule; but his motion was dismissed on the grounds stated above.

The City Council of Charleston vs. John Brandt.

In an action for a penalty, under a City Ordinance against negroes being permitted to assemble or loiter in any shop longer than while actually engaged in lawful trading, proof that negroes remained for two hours in and about the defendant's premises, threw on him the burthen of shewing that they were not there unlawfully.

*Before his HONOUR THE RECORDER of the City of Charleston,
April, 1839.*

Sum. Pro. to recover a penalty of \$20, for violation of a City Ordinance, of the 26th November, 1836, Clause 22d, viz. "That no negroes or persons of colour, whether bond or free, shall be permitted to assemble or loiter in any shop, or in or about the door thereof, and shall not be allowed to sit down or remain therein, longer than while actually engaged in purchasing such articles as they may be lawfully authorized to purchase."

The evidence was that, one Sunday morning, there was a concourse of negroes about defendant's shop; that they continued in and about it during nearly two hours that witness observed them. Witness could not see, but heard those inside laughing and talking, and supposed there were eight or ten of them. Defendant kept his gate closed, and, from time to time, opened it to let negroes in or out. Amongst others, he let out certain negroes described in the process.

The Hon. Recorder charged the jury that the evidence raised such a presumption against the defendant, as imposed on him the necessity of proving that the negroes about his premises were not there unlawfully.

Verdict for the City.

The defendant appealed, for error in his Honour's charge; but,

Curia, per O'NEALL, J. held that the jury had been properly instructed.

T. J. Ivy vs. H. Wilson.

The defendant's Steamboat being about to run foul of that of the plaintiff, a slave of the latter was mortally injured in an attempt to prevent the collision. Some shewing was made by the defendant, that the negro had wantonly exposed himself to the danger; but the jury were instructed that such a presumption ought not to be admitted in the case of a slave protecting his owner's property, without clear proof.

Before O'NEALL, J. at Charleston, January Term, 1840.

This was an action by the Captain of the steamer Dudley, against the Captain of the steamer Neptune, for a mortal injury to the plaintiff's slave, occasioned by the collision of the two boats. The Neptune, in coming in to her accustomed landing, fell foul of the other vessel, which was moored to a wharf immediately below. Whether this accident was a natural and unavoidable casualty, or the result of negligence or want of skill, was the subject of much conflicting and very contradictory professional opinion.

When the Neptune was within a hundred yards of the Dudley, the plaintiff ordered up all hands to assist in bearing her off and preventing the collision. Amongst them was the plaintiff's slave, George, described as a bold, ambitious, adventurous fellow, who got on the guard of the boat, outside of the bulwarks, and, though warned to avoid the danger, remained in that position till one of his legs was caught and crushed between the two vessels. In consequence of this injury, he soon afterwards died. Capt. Marshall, the pilot of the Dudley, testified that George's position was a proper one to prevent the collision, but was one of great danger, and that, in assuming it, he violated one of the first laws of nature, self preservation: but, examined in reply, he said that that was what every sailor did in discharge of the perilous duties of his vocation. The slave was worth from \$1000 to \$1200.

The jury were instructed that, to make the defendant lia-

ble, the collision must have resulted from his intention, his want of skill, or his negligence in navigating his vessel. Nor would he be liable if the negro had exposed himself to the danger unnecessarily; but, the Court said, if they believed that the negro's position was taken to protect the owner's property (the boat) from injury, then they ought not to presume that he wantonly exposed himself to unnecessary danger. That conclusion ought to be plainly established by proof before they adopted it.

Verdict for the plaintiff, \$750.

The defendant appealed, on the ground that the verdict was against evidence, and,

That his Honour erred in charging that the negro ought to be presumed not to have wantonly exposed himself.

Curia, per O'NEALL, J. We think the instructions given to the jury by the Judge below, were proper.

The jury had evidence upon which they might conclude the defendant was guilty of negligence; if so, the verdict is right.

Yeadon & Macbeth for the motion; *Memminger & Jervey*, contra.

The State vs. Benjamin Windham.

An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486; 5 Stat. So. Ca. 139,) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered.

If the objection had been made in time, the judge on the circuit would have sent the jury back to amend their verdict.—(*Buller J.*)

Before BUTLER, J. at Williamsburg, Spring Term, 1839.

The defendant was indicted for cattle-stealing. The indictment charged, in one count, the stealing of five bulls of the value of \$50, five cows of the value of \$50, five oxen of the value of \$50, five steers of the value of \$50, and five calves of the value of \$25, of the goods and chattels of Theodore L. Gourdin and William Lefrage, against the Act of the General Assembly, &c.; and in the second count, the stealing of the same kind and number of animals of the goods and chattels of a certain person, to the jurors unknown, against the said Act, &c.

The evidence, which it is not necessary to detail, did not embrace, at the utmost, more than five or six, and was not definite, except as to three head of cattle, the property of Gourdin and Lefrage.

The presiding Judge instructed the jury, if they found the defendant guilty, that they should state in their verdict the exact number of cattle stolen, so that a definite judgement might be pronounced according to law. "The jury returned a general verdict of guilty, and, not having it brought to my attention particularly at the time, I did not send them back to correct, or rather to make it more explicit, which I would have done if I had been called to the subject before the verdict had been recorded."

The defendant appealed, on the ground,—

That the general verdict, of guilty of the whole charge, was clearly against evidence.

Curia, per BUTLER, J. This verdict, enforced according to its strict import, would subject the defendant to penalties beyond his actual guilt, and is too indefinite to authorize the judgment of the Court. In the case of *The State vs. Herring*, (1 Brev. R. 159,) it is determined "that on an indictment for larceny of several articles of the same kind, for each

of which there is a specific penalty, if a less number be proved than that laid in the indictment, and the jury find a general verdict, a new trial will be granted." So a new trial must be ordered in this case.

The whole Court concurred.

Moses for the motion.

The State vs. Henry Boice.

An indictment (under A. A. 1817 and 1814,) for selling liquor to the slave of Wm. Patton, charged the selling to have been without "a written order of or from the said William Boice," (instead of *Patton, the owner*,) "or of or from any other person having charge or management of said slave." After verdict of conviction, judgment was arrested.

Before EVANS, J. at Charleston, January Term, 1840.

This was an indictment for selling spirits to a negro, the slave of William Patton. Verdict, *guilty*.

The defendant appealed, and moved in arrest of judgment on account of a defect in the face of the indictment.

Curia, per RICHARDSON, J. The indictment charges that the defendant, Henry Boice, did sell and deliver, to a certain slave of William Patton, spirituous liquors, &c. "not having a written order of or from the said William Boice, [instead of *Patton*] or of or from any other person having the care and management of said slave, to sell or deliver the said spirituous liquors to the said slave," &c.

Both the A. A. 1817, (p. 25,) and A. A. 1834, (p. 12,) under one or both of which this indictment is preferred, prohibit such selling and delivery to a slave, without the written order of the owner, or of some person having the care and

management of the slave. Now, indictments upon statutes must state all the facts and circumstances which make up the definition of the offence, so as to bring the party accused precisely within the statute, (*The State vs. Foster*, 3 M'C. 442; *The State vs. O'Bannon*, 1 Bailey R. 144,) and nothing can be taken by mere intendment.

In the indictment before us, the trading is charged to have been without the order "of the said *William Boice*, or of any other person having the care or management of the said slave." There is no negation of Boice having had the written order of the owner, *William Patton*, without which averment the offence defined by the statute is not set forth completely in the indictment; for it might be, for aught that appears, that the defendant did have such an order, which would take his case out of the statute.

Judgment arrested; GANTT, BUTLER and EARLE, JJ. concurring.

Yeadon & Macbeth for the motion; *Bailey*, contra.

The State vs. D. N. Ingraham.

A commissioned officer in the U. S. Navy, is not exempt from Jury service.

All previously existing exemptions are virtually repealed by the *Jury Law* of 1799.

Before EARLE, J. at Charleston, May Term, 1839.

The defendant, a Lieutenant in the Navy of the United States, was a citizen of South Carolina, resident in Charleston, and owned property there. Being on furlough, and at home in the city, he was summoned to serve as a juror, and

made default. On the return of a *scire facias*, he shewed cause, and claimed exemption from that duty, by virtue of his commission in the U. S. service. The Court adjudged the cause to be insufficient, and fined him accordingly.

This order the defendant moved the Court of Appeals to rescind.

Curia, per O'NEALL, J. The defendant rests his title to exemption on the 18th Sec. of the A. A. 1731, (P. L. 126, 3 Stat. So. Ca. 278,) which exempts from serving on juries "all persons who heretofore have been, now are, or hereafter shall be, members of his Majesty's Council, judges or assistant judges, in any of the courts of this Province, and all members of the Assembly, and officers of any of the courts of justice, during the time they shall be members, and during their continuance in such office, and all persons exempted by the laws and statutes of Great Britain." It may be conceded that, according to the laws and statutes of Great Britain, the defendant would be exempted, but this will not help him; for the A. A. 1799, sec. 6, 7 and 8, (1 Faust, 264,) contains provisions totally repugnant to the clause recited from the Act of 1731, and must therefore be regarded as a repeal of it. The 6th sec. provides that, from the tax return of every third year, new jury lists shall be made, containing the names of such persons as were entitled, by the article of the Constitution then of force, to vote for members of the State Legislature, and those names are directed to be put in the division of the jury box numbered *one*. The 7th sec. provides, that out of those names shall be drawn the grand, petit and pleas jurors, who are to be summoned and impannelled as jurors then were. The 8th sec. declares, "that a juror who shall be legally summoned to appear and serve at any of the Courts established by the Act hereby to be amended, and shall neglect or refuse so to do, shall forfeit and pay a sum

not exceeding \$20 and 7 per cent upon his general State tax for the year preceding, unless such persons shall shew good and sufficient cause of excuse, *upon oath*, to any of the said judges, at the next sitting of the court after the sitting to which such person shall have been summoned to serve as aforesaid." This provision, taken in connection with the 6th and 7th sections of the same Act, swept away all previous exemptions; and every free white man of the age of 21 years, being a citizen of this State, and having resided therein two years previous to the general election, preceding the time of his being summoned as a juror, and who has a freehold estate of fifty acres of land, or a town lot of which he has been seized and possessed six months before such election, or not having such freehold or town lot, if he has been, six months before such election, a resident in the district in which he may be called to serve, and has paid a tax the preceding year of three shillings sterling, towards the support of this government, (*see Const. So. Ca., Art 1, Sec. 4, and The State vs. Massy, 2 Hill R. 379,*) is now liable to serve as a juror, unless he can shew that since the Act of 1799, he has been by law exempted.

Because a man is liable to serve as a juror, it does not follow that he will be inexorably required so to do, when his other public functions conflict with the discharge of this duty. On making proper application, he will be excused. But the defendant was not in actual service, so that his duty to the United States could not conflict with his duty as a juror; and I think a little service in the jury box might not be useless to one of the gallant sons of the stormy deep, who is often called upon to bear his country's standard to far distant shores. As a juror, he would learn much of the civil institutions of his country, to which he was before comparatively a stranger, and he would thus have it in his power to compare them with foreign institutions, or with more perfect knowledge to protect some fellow-citizen's right against the

aggression of foreign governments. This duty, instead of being regarded as an onerous one, ought to be cheerfully and promptly borne by every man, the rich and the poor, the high and the low. The perfect equality of the jury box is the best practical exposition of legal liberty. To it we are perhaps indebted for the noble heritage which our ancestors of '76 won for us by blood and toil. To it we shall look, with conscious security, for the preservation of life, liberty and property, as long as it exists. These considerations, addressed to a reflecting people, who prize their rights and love their country, will make every man court instead of shunning the discharge of the duty of a juror.

The order of the Court below was confirmed ; RICHARDSON, BUTLER and EARLE, JJ. concurring.

Peronneau, Mazyck & Finley for the motion.

Charles Edmondston and James L. Petigru vs. John J. Hughes.

A deed 35 years old was allowed to go to the jury as evidence, upon proof of the handwriting of the two subscribing witnesses, who were dead, and of its having been duly registered in the proper office.

After proof of the signatures of the subscribing witnesses, who are dead, "it would seem, that it is not necessary to prove the grantor's handwriting; for his signature, seal and delivery are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done, it is safest and best to do it.—(O'Neill, J.)

Upon evidence that an ancient deed had been legally proved before a justice of the peace and registered; "If there were no other circumstance in this case I should say that that warranted the judge in sending a deed 35 years old, to the jury."—(*Id.*)

Before GANTT, J. at Georgetown, Fall Term, 1839.

Trespass to try title to land. The plaintiffs offered, in evidence, a deed dated 1st April, 1805, purporting to be a conveyance of the land in dispute from William Frierson, sheriff of Georgetown, to Adam Tunno, and which was essential to complete their chain of title. It was in proof that Frierson was sheriff at that time, and left the district soon after; that the signatures of the two subscribing witnesses (whose death appears to be admitted, though the fact does not appear, either in the report of the circuit judge, or in his notes of the evidence,) were their genuine handwriting; and that the deed had been proved before a justice of the peace, and was duly recorded in the Register's office. The handwriting of Frierson, the grantor, was not proved, nor was it shewn that there had been any possession in the grantee under the deed.

The defendant insisted against the admissibility of the deed in evidence, and moved for a non-suit; but the Court overruled the objection, and sent the case to the jury, who found for the plaintiffs.

The defendant appealed, and renewed his motion for a non-suit.

Curia, per O'NEALL, J. To answer properly the question raised by this appeal, it will be well to understand what is the legal effect of proof of the handwriting of subscribing witnesses. In *M'Elwee vs. Sutton*, (2 Bailey R. 128,) it is correctly said to establish the deed upon the presumption,—1st. that if the deed had not been executed as it purports to have been, the witnesses would not have subscribed their names—and, 2nd. that if the witnesses were alive, they would give all the necessary evidence to establish the fact of execution. These being the legal conclusions from such

secondary evidence, introduced as the best which the case is susceptible of, when the witnesses are dead; it would seem to follow, that it is not necessary to prove the grantor's handwriting; for, his signature, seal and delivery are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done, it is safest and best to prove it.

Here, however, the deed is an *ancient* one. 35 years are passed since its execution. Twenty years, in this State, is the time after which, generally, presumption stands in place of proof, for the memory of man is supposed not to go back beyond it; and deeds, if they are thirty years old, with possession under them, or other circumstances accompanying them and shewing their authenticity, are admitted in evidence without proof of execution. In *Wagner et al. vs. Aiton*, (Rice R. 100,) a deed thirty-nine years old was admitted in evidence, on proof of the handwriting of one witness, and of the registry of the deed. In that case, the Court remarked that the proof was "all which could be given, and enough to establish the existence of the paper more than thirty years before." In *Jackson ex dem. Livingston et al. vs. Burton*, (11 Johns. R. 64,) the subject underwent the review of the Supreme Court of New York, and a deed forty-four years old was admitted in evidence, on proof of the handwriting of one of the subscribing witnesses. Ch. J. Kent said that "the proof of the deed was *prima facie* sufficient;" nor was it even contended that it would have been otherwise if proof had been given of the handwriting of the other subscribing witness.

Among our own decisions, a single case seems to be at variance with the position for which I am contending, (*Sims vs. De Graffenreid*, 4 M'C. 253,) but that case is very imperfectly reported; nor does that go so far as to decide that, upon evidence of the death of the witnesses, and proof of their handwriting, the deed would not have been proved. The

decision there was, that the death and evidence of the handwriting of *one* witness was not sufficient.

Upon a subsequent trial, the death and handwriting of the other witness being proved, as well as the registry of the deed, the plaintiff again obtained a verdict, which was not disturbed.

The case of *Cornneil vs. Bickley*, (1 M'C. R. 466,) where the grantor's handwriting was proved, and the subscribing witnesses were out of the State, put the objection to the proof of a *recent* deed upon the absence of evidence of the handwriting of the latter. From which it appears, that proof of the grantor's handwriting did not, *per se*, establish the *factum* of execution, and that the handwriting of the witnesses must be proved to establish it. The reason of this is plain: in ordinary cases, the grantor could not prove the execution of his own deed; and, if he is incompetent as a witness, it would seem to follow that proof of his handwriting could only be a circumstance in aid of the proof of execution, and not essential to it.

Indeed, in no case of secondary evidence, is plenary proof to be expected. Such proof as will create a belief of the fact is all that can be required. When subscribing witnesses to a deed or will are dead, or removed, less proof is to be looked for than might be obtained if they were present; and, if many years have elapsed since the execution of the paper, the proof becomes, of course, more difficult and less full. In *Stockdale vs. Young*, (2 M'C. R. 531,) there was a deed from John to Edward Rutledge, witnessed by Keating Lewis Simmons and John Dunlap, Esqrs. The parties and witnesses being dead, the deed, which was twenty-six years old, was admitted, on proof of the grantor's handwriting and of that of one of the subscribing witnesses, that of the other being difficult of proof. That case shews that there is no inflexible rule which compels the Court to require in all cases proof of every matter which may usually be given, and also,

that, when secondary evidence is resorted to, which satisfies the mind of a fact, the jury may find it accordingly. So in *Duncan vs. Beard*, (2 N. & M'C. 400,) the fact that an ancient will was found in the proper office, and had been admitted to probate, was held to be such a mark of authenticity as would justify the court in permitting it to go to the jury. And the reason of that decision reaches another circumstance in this case. By an Act of the Legislature, deeds are allowed to be recorded on being proved before a justice of the peace. And an attested copy of a deed thus recorded, is, in the event of the loss of the original, evidence without other proof. When a deed is found to have been legally proved and registered, it is as strong a proof of its authenticity as to find a will in the proper office. If there were no other circumstance in this case, I should say that *that* warranted the Judge in sending a deed 35 years old to the jury.

Motion dismissed ; the whole Court concurring.

Harlee for the motion ; *Lesesne*, contra.

James D. Lyles vs. Robert Bass.

The defendant, a free coloured man, purchased an unsound slave who had been his wife, at a price greater than her sound value, although well aware of her unsoundness, and warned of it by the owner. It was a binding contract, and the verdict of a jury to the contrary was not sent back.

Before GANTT, J. at Marion, Fall Term, 1839.

Assumpsit, on a sealed note, given for the purchase of a female slave, named Doll. She had been the wife of the

defendant, a free man of colour, and had been separated from him by her master, Lyles, who carried her away into North Carolina. The defendant went to North Carolina to purchase her. Lyles told him she was very sick—that she was unsound, and he had better not buy her; but he said, it was his own look out, she was his wife. Lyles then told him that, if she died before she left there, he should not pay for her, and the bargain was completed by the defendant giving his notes for \$500. At the time of purchase, and long before, Doll was obviously very ill—altogether unfit for service, and of no pecuniary value. She afterwards declined constantly till she died. When sound, she had been appraised at \$100 and offered for sale for \$300. Bass was a man slow of apprehension, and easily imposed upon.

Verdict for the defendant.

The plaintiff appealed from this verdict, as contrary to law and to the evidence.

Curia, per RICHARDSON, J. This case furnishes an instance in which the Court must order a reconsideration of the evidence by the jury. At the time of the purchase, Lyles told Bass that Doll “was unsound;” “that she was very sick,” and “that he had better not buy her.” But Bass replied, “it was his own look out, that she was his wife.” Lyles then said, “if Doll died before she left there,” (his house in North Carolina,) “Bass should not pay for her.” But besides the positive evidence to this effect, Bass knew Doll well. Under such circumstances every man must stand to his own determination, as was observed by the Court in the case of *Williams vs. Vance*, (Dudley R. 97.) Bass’s determination was to give a very high price for a very sickly slave, in order to continue her as his wife. It may have been a bad bargain to Bass. But the office of this Court is to enforce contracts, not to make them, and we cannot deprive Lyles of his good bargain where there appears to have been no concealment or fraud. He may have rigidly

exacted a high price, yet it is a binding contract, when openly and fairly made. And a man who purchases property for his personal gratification, must pay the price agreed on. As Bass said, at the time of the bargain, "it was his own look out—Doll was his wife."

This is the true law of the case, and he must take the consequences of his bargain, as he plainly understood it.

BUTLER and EARLE, JJ. concurred.

Harlee for the motion; *Bailey*, contra.

Robert M. Venning vs. Thomas J. Gantt.

The purchaser of a negro had notice of his having a shortness of breath, which was attributed to a severe fall. It turned out, afterwards, that his lungs must have been dangerously diseased at the time of sale; though there was no appearance of unfairness or concealment. *Held* that there was not sufficient notice to relieve the vendor for a sound price from his implied warranty.

The sufficiency of notice of unsoundness, where it is equivocal, is a point for the jury to determine.

*Before the HONOURABLE RECORDER of the City Court of
Charleston, January, 1840.*

This was an action of assumpsit on an implied warranty of soundness, to recover the value of a negro named Philander, who was, with some others, sold by the defendant, through Thomas Gadsden, to the plaintiff, on the 9th of March, 1839, and died soon after.

The plaintiff was fully informed that Philander had a shortness of breath, supposed to have been occasioned by a fall from a house not long previous. It was remarked by several witnesses that he looked quite sick on the day of sale,

and, by one who had known him before, that he had fallen off very much. But it did not appear that there was then any swelling of the abdomen, or other symptom, besides those already mentioned, either of dropsy or of diseased lungs. Mr. Gadsden, who effected the sale, said he did not observe or know of any. Immediately after the sale, on a raw cold day, the negro was exposed to the weather in crossing the river to the plaintiff's premises. The next day his legs and abdomen were obviously swollen, and he could not walk a hundred yards. On the 11th Dr. Bailey was called in. Being sworn, he described Philander's symptoms: considered his malady a complication of diseased lungs and dropsy; thought it was of long standing and incurable, and could not have originated between that time and the 7th, though exposure to the weather then might have aggravated it. Dr. Ogier, sworn, thought that the symptoms described by Dr. Bailey, except the swelling, indicated *pneumonia*, a disease prevalent at that time, and often of sudden occurrence, which might have been occasioned by the fall, or by exposure: but neither this disease nor these causes could account for extensive swelling of the abdomen and legs.

Gadsden sent his clerk to the defendant after the sale, to inquire if he should insert in the bill of sale a warranty of soundness: defendant directed him not to do so. It did not appear whether this was done with the privity of the plaintiff or not; but it was Gadsden's general practice, to apply of his own accord to the vender for instructions in this particular.

"I charged the jury," said his Honour, "that a sound price warranted a sound commodity; but that a warranty of soundness could not be implied, when there was a refusal at the time of sale to warrant. Whether *Venning*, by himself or agent, required a warranty from Gantt, which he refused, I submitted to the jury, on the following testimony: Gadsden was the agent of both parties; after the sale, and before the

delivery, he sent Spencer, his clerk, to ask Gantt if he should insert a warranty of soundness, and Gantt refused; that Venning could not be considered as waiving his implied warranty, unless he knew that Gantt refused to warrant. That if they came to the conclusion that the implied warranty was not négatived, then the next question I submitted to them was, did the price warrant the soundness; if so, then I charged them, that it could not be considered a warranty against the fall and its consequences, because plaintiff bought with a full knowledge of that. That if they believed the negro died from the fall, or its effects, the plaintiff was not entitled to recover; but if he died from another disease not connected with the fall, existing at the time of sale, he was entitled to recover."

Verdict for the plaintiff. Defendant appealed,

Because he had expressly refused to warrant the negro, and,

Because the plaintiff had sufficient notice of the unsoundness.

Curia, per RICHARDSON, J. Considerable efforts have been made to bring this case within the established exception to the general rule, that a sound price warrants sound property; by reason of notice to the purchaser. It was submitted with full and clear instruction by the Court, and the verdict verifies these facts: That a sound price was paid for Philander, that there was an implied warranty of soundness, and that Philander died of a disease disconnected with the fall; to which disease the implied warranty extended. Do the facts, then, and the law of the case warrant the inference that the jury have been mistaken? The notice received that the negro had sustained a fall, to which his short breathing was ascribed, was scarcely a reasonable intimation that such short breathing might arise from some fatal malady, so as to put Venning on his guard. Such notice, coupled with the supposed accidental cause, might rather detract from

his suspicion, that it had a more permanent and fatal source in some disease unknown to the seller or purchaser.

This case is very unlike that of *Vance vs. Williams*, (Dudley R. 97.) There notice of the danger was given, and the reason assigned for apprehension of the very disease which caused the negro's death. Nor is it like the case of *Lyles vs. Bass*, (*supra*. p. 85,) decided at this term. Bass bought at a sound price, but, as he expressed it, on his own look out, after explicit notice that she was very sickly. These two cases plainly illustrate the reason of the exceptions to the rule, that a sound price warrants sound property. The exception has place where the purchaser has been fairly put upon his guard, so as to make the consequences that follow, his own risk. This being the essential ground of the defence in the case before us, can we infer that the jury were mistaken in concluding that the notice to Venning was not sufficient? Could notice of an affection ascribed to an accidental cause put any but a very suspicious mind on its guard against chronic, constitutional disease? Besides, the vendor's total ignorance of Philander having dropsy, or disease of the lungs, renders it the more probable that the plaintiff was not set upon his guard against them. They were unsuspected; and the short breathing of the negro was attributed to the fall.

It may be justly added, too, that, the notice to Venning being equivocal, whether it was sufficient to put him on his guard generally, is necessarily a part of the case decided by the jury. And they have, by their verdict, negatived the inference of fair notice to Venning, which was essential to the defence.

Upon the whole case then, the Court considers it well submitted to the jury, and legally disposed of, by the proper tribunal under the now well established doctrine of *Timrod vs. Shoolbred*, (1 Bay R. 324.)

Motion dismissed; EARLE and BUTLER, JJ. concurring.

O'NEALL, J. I dissent, on the ground that, where there is a refusal to warrant, or where a defect is pointed out, or known, there is no implied warranty; and, to entitle the plaintiff to recover, there must have been an express warranty of the negro, or other chattel sold, in all other respects; or a deceit proved.

Bentham & Hunt for the motion; *Yeadon*, contra.

Willis Wiggins vs. Joseph Vaught.

"Promise to pay as soon as I am in possession of funds to do so from the estate of B." is not a promissory note within the statute. (But *otherwise*, it seems, if the promise had been unconditional, though a particular fund was designated.)

Having been declared on as such, exception was properly taken by motion for a non-suit, after general issue pleaded.

The expense, both of a full trial and of an appeal, having accrued from a non-suit having been improperly refused below, the Court exercised the discretion of ordering, instead of a non-suit, a new trial with leave to the plaintiff to amend.

Before GANTT, J. at Conwayboro', Fall Term, 1839.

This was an action of assumpsit brought on the following instrument:

"Due Willis Wiggins, two hundred and forty-two dollars sixty-four cents, which I promise to pay as soon as I am in possession of funds to do so from the estate of Bellune.

JOS. VAUGHT, *Guardian*,
for JOHN D. & ——— BELLUNE.

December 14, 1837."

The declaration contained, besides the usual money counts, a special count, as follows:—"For that whereas, the said de-

fendant, &c., did make his certain note or due bill in writing, commonly called a promissory note, with his own proper handwriting, &c., by which said note or due bill, the said Joseph Vaught did promise to pay, or cause to be paid unto the said Willis Wiggins the full and just sum of one hundred and forty-two dollars sixty-four cents, as soon as he was in possession of funds from the estate of Bellune, for value received. And the said time for the payment of the said sum of money mentioned in the said note has elapsed; as the said Joseph Vaught has been in funds of the estate of Bellune, or has had sufficient time and means to possess himself thereof."

The defendant pleaded the general issue, and, upon the trial moved for a non-suit on the ground, 1st. that the instrument declared on was not a promissory note within the meaning of the statute; but, 2nd, was a special contract, the consideration of which should have been set out in the declaration and proved upon the trial.

The Court refused the motion and, the defendant being proved to have been in possession of funds of the estate of Bellune, the jury found for the plaintiff.

The defendant appealed, renewing his motion for non-suit.

Curia, per O'NEALL, J. The only question necessary to be considered is, whether the note declared on is a promissory note. Chitty on Bills, 54, says, that there are two principal qualities essential to the validity of a bill or note—first, that it be *payable at all events*, not dependant on any contingency, nor payable out of a particular fund—and secondly, that it be payable for money only.

The note in this case is payable "as soon as I am in possession of funds to do so from the estate of Bellune." If the maker had never received those funds, he never could have been made liable on the note. It was therefore payable on a contingency. It was to be paid, too, out of the funds of the

estate of Bellune. *Hill vs. Halford et al.* (2 Bos. & Pul. 413,) is exactly parallel to the case before us. Halford and another sued Hill, as the maker of a note, thereby promising to pay them £190 on the sale or produce, immediately when sold, of the White Hart Inn, St. Alban's, Herts, and the goods, &c., value received. The declaration averred a sale of the Inn and goods, before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed and general damages recovered, Hill brought a writ of error in the Exchequer Chamber, and the Court held that this promise could not be declared on as a note, and therefore reversed the judgment. That case, it will be observed, is identical with this in two particulars; that it was dependant for payment on funds hereafter to be obtained, and that the declaration there, as in this case, averred that such funds had been obtained. So, in the case of *Carlos vs. Fancourt*, (5 T. R. 482,) it was held that a note, whereby Carlos promised to pay Fancourt's wife the sum of £10 out of his money that should arise from his reversion of £43 when sold, was held not to be a note within the statute 3 and 4 Ann, c. 9. That case, like this, was a promise to pay on an uncertain future event and out of a particular fund. Many other cases of a similar kind might be cited, but the authorities are so uniform and clear on the subject, that it would be a waste of time to state them further. The only cases which can be found, where notes payable out of a fund are held to be promissory notes, are where there is an unconditional promise to pay at a certain time, and the fund is designated as the means of payment: then, after the time has elapsed, the promise is absolute and the liability to pay perfect, without any reference to the fund. As in the cases of *McLeod vs. Snee*, (Str. 762,) and *Burchell admr. vs. Slocock*, (Ld. Ray'd. 1545.)

It was objected on the part of the plaintiff that the defect in this case was apparent on the face of the record, and ought to have been taken advantage of by demurrer, and could now be resorted to. But this is a mistake—defects of form are

aided by verdict. This however, is a defect of substance, both in the declaration and in the proof. If the note be not a promissory note within the statute, then it was necessary in the declaration to declare upon it as a common law instrument. In such a case the consideration must be stated and the agreement consequent thereupon ; and the condition precedent to the liability must be averred to have happened. All these matters must be proved as laid. In the declaration before us, the note is stated as the promise, and the happening of the contingency or performance of the condition is averred. But nothing is said in the declaration, nor was there any proof given on the trial, about the consideration. The plaintiff was therefore, neither on his allegation, nor proof, entitled to recover. (*Chitty on Bills* 7, 88, 89.) In addition to these authorities, it is only necessary to refer to the cases of *Hill vs. Halford*, (2 Bos. & Pul. 413,) and *Carlos vs. Fancourt*, (5 T. R. 482,) by which it will be seen that the objection that an instrument declared on as a promissory note which cannot in law be so regarded, may, even after a judgement by default and writ of enquiry executed and damages recovered, be taken advantage of and the judgment reversed. This shews the objection to be one of substance, which cannot be cured by pleading, and hence the party was entitled to move on the trial for a non-suit, and is here entitled to renew it. It would have been proper on the trial below that the judge should have granted the motion for a non-suit, but as he overruled it, and the parties have been put to the expense of a full trial, and of a motion in this Court, and as many precedents as *Jamieson vs. Lindsay*, (4 M'C. 93,) justify us in refusing here to non-suit the plaintiff, but to order a new trial and give the plaintiff leave to amend, that course will now be pursued. A new trial is ordered, and the plaintiff has leave to amend his declaration by adding a count as on a common law instrument.

RICHARDSON, EARLE and BUTLER, JJ. concurred.

Munro for the motion ; *Harlee*, contra.

The State ex relatione William Luten vs. the Commissioners of Roads for St. George's Parish.

Where slaves, hired by the month, had been employed the greater part of the year by the same person, in working on the Rail Road, the hirer was properly held accountable by the Commissioners for their road service in the parish in which they were so employed.

Hands working on the Rail Road, (though by law a public highway,) are not exempt from ordinary road duty.

The road duty of hired slaves is due at the place where they have resided and worked the greater part of the year.

In what instances the hirer of, slaves, or the owner, should be made liable for their road service, cannot be indicated by any precise rule, but must depend on circumstances to be judged of by the Commissioners.

Before BUTLER, J. at Walterboro,' Fall Term, 1839.

Declaration in prohibition; upon which the following verdict was had:

"We find that the plaintiff, having a plantation and house in the lower part of St. George's parish, had hired by the month, and had under his control, eighteen male hands, between the ages of sixteen and fifty, which belonged to, and were hired from, different persons residing in St. James's parish. That for the greater part of the year 1837, the plaintiff, as a contractor on the Rail Road, had the said hands employed in making embankments on a portion of said Rail Road, which runs through the upper part of St. George's parish. That there are two Boards of Commissioners for said parish; and that the said hands were at work on the Rail Road, within the limits of the upper Board. That the Commissioners for the upper Board required the plaintiff to send said hands to work on the highway in their division. That the plaintiff objected to the liability of said hands working on roads in their jurisdiction. Nevertheless, he appeared before the Board, and made a return, according to an entry in the books of the Board, of eighteen hands; but

verbally reserving to himself all his legal rights ; and we find that he ought not to be deprived of any of his legal rights by said return.

“ If, according to the above facts, the plaintiff ought to recover, we find for him : if not, we find for defendants.”

On this finding the relator moved for a writ of prohibition, which was refused.

The following extract from his Honor's opinion below, is given here because its reasoning is adopted by the Court.

“ The main ground relied on, in argument, was, that the relator being a contractor on the Rail Road, and having his hands employed on the same, as one of the public highways of the State, was exempt from liability to work on the common highway. This ground cannot be sustained. The Rail Road has been declared to be a public highway, upon which all the citizens of the country have a right to travel, and transport their goods. But, by a charter from the State, it is exclusively under the control of a private company ; that company deriving all the income arising from it, is exclusively under an obligation to keep it in repair. They cannot compel any citizen to work on it ; but must employ their own means of working on, and keeping it in a proper state, for the safe transportation of passengers and goods. Any one who becomes a contractor on it, does so voluntarily, and for his own advantage. He has chosen to transfer his labor from his own plantation, or other private employment, to employ it for others. He is compensated for his labor by contract with a particular set of individuals, and cannot be thereby exempt from the obligations of other citizens, to work on the highway of the State, for which they receive no stipulated compensation. If the relator had been the owner of the negroes, he certainly would have been liable for their default, in not working on the roads within the jurisdiction of the defendants. For the hands had been employed for the greater part of the year on that portion of the Rail Road

that is within the jurisdiction of the Commissioners of St. George's. The serious difficulty in the case arises from the fact, that the relator is not the owner of the hands, but had hired them by the month from their owners, residing in St. James."

The relator appealed, and renewed his motion for the writ.

Curia, per BUTLER, J. The circuit decision in this case must be affirmed. The first ground for the motion, as noticed in the opinion below, cannot be sustained, for the obvious reasons therein stated. The other requires, perhaps, some comment. It was this, that, although the hands of the relator had been employed for the greater part of the year within the jurisdiction of the defendants, they did not belong to him but for a limited time, and were not liable to be returned by him, so as to subject him to liability for their not working on the road.

By the A. A. 1825, *sec. 9*, (p. 31,) all the male inhabitants of this State from 16 to 50 years of age, are declared liable to work on the public roads, &c., and the Commissioners are impowered to direct on what roads they shall be employed, provided that such road be within ten miles of the residence of the person, or of the place where the slaves are employed the greater part of the year. *Sec. 11* authorizes each Board of Commissioners to declare what inhabitants are liable to work on any road or part of a road in their respective parishes or districts, or divisions, subject to the restrictions of time and place previously mentioned; and each Commissioner, in his respective division, is required to call on all the inhabitants within the same, to make a return, (on oath, if required,) of all the male slaves belonging to them, or under their management and direction, from 16 to 50, and who reside in such parish or district for the *most of the year*. The Commissioners, by the return made to them, must decide on the liability of the hands to perform service on the roads,

according to their time of residence. As soon as it is ascertained that slaves have resided and worked at any particular place for the greater part of the year, the Commissioners have a right to command their labor. They cannot command the slaves themselves, but they may proceed against those who have an interest in, and a control over them. Against whom they are to proceed, must be, in the first instance, a question addressed to their judgement and discretion, for they have a right to say what inhabitants and slaves shall work on any particular road. They might say some of a man's hands should work on one road and some on another, and their owner on a third.

In what instances the hirer of hands, having a limited interest in them, or the owner, should be made liable for their service, cannot be indicated by any precise rule, but must depend on circumstances, to be judged of by the Commissioners in the exercise of a sound discretion. One who has hired a hand for a day, or a week, might fairly claim exemption, while a hirer for three years, or one year, would not be entitled to it. In the case before the Court, it appears that the hands in the possession of the relator had been employed by him for his benefit, for the greater part of the year, within the limits of defendant's jurisdiction. For this time he was their master and owner, and was properly amenable to the Commissioners for their road duty. The Commissioners clearly had jurisdiction of the relator and his hands, and we do not perceive that they have shewn such a disposition to abuse it as to require the interference of this Court to restrain the exercise of their authority.

Upon both grounds, therefore, the relator's motion is refused. The whole Court concurred.

Edwards for the motion ; *Rhett*, contra.

James Moorhead vs. Rachel Barrett.

Avowry by an administratrix for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. *Held* that no further title need be shewn, and a verdict for the avowant was right.

A landlord is not bound to set out in his avowry for rent in arrear any further title than the lease under which his tenant entered and held the premises.

The Statute 11 Geo. II, c. 19, though not expressly made of force in this State, has been adopted in practice.

Before EARLE, J. *at* Charleston, May Term, 1839.

This was an action of replevin. Defendant avowed for rent in arrear. She was the administratrix of her deceased husband, and the demise was after his death and in her name. The plaintiff in replevin, having been called on by the avowant's agent before the distress, acknowledged the tenancy and the sum due as rent in arrear, and promised payment. The avowry did not describe the defendant as administratrix, nor set out the title; and on these grounds exception was taken, but overruled by the Court. Verdict for the avowant.

The plaintiff appealed on the same exceptions, urging, in support of the latter, that the Stat. 11 Geo. II, c. 19, dispensing with the necessity of stating the title of the avowant in the avowry, is not of force here, (1 M'C. R. 299,) and that the common law rule is the law of this State. (5 Cow. R. 501; 1 Johns. R. 379.)

Curia, per BUTLER, J. The decision of a single point in this case will dispose of all the questions involved in the grounds of appeal, viz. Is a landlord, who has distrained for rent, bound to set out in his avowry any thing more than the lease under which the tenant entered and held the premises? The rule of law is unquestionable, that a tenant cannot dispute his landlord's title: he is estopped, by his own deed, from denying any thing contained in it: that constitutes the law of the contract. Hence, in an action to try titles,

by a landlord against a tenant holding over, the plaintiff is not required to go farther back into his title than the lease disclosing the relation of the parties, to entitle him to recover the land and damages for its use. If the land itself may be thus recovered, why may not the rent, which is but an issue from the land?

The avowry, in this case, sets out the lease under which defendant entered, and by which he bound himself to pay rent to defendant, not as the representative of any one, but absolutely, as *Rachel Barrett*. He must abide the terms of his deed, and cannot dispute the character of the avowant as therein recognized. This being the case, the plaintiff has no right to require the defendant to set out *her* title to the premises, but is controlled by the title under which *he* holds them. There may, possibly, be cases where the plaintiff in replevin may require the avowant to set out title to land, as where the plaintiff is a stranger to the avowant; but, as between landlord and tenant, it never can be necessary.

By Stat. 11 Geo. II, c. 19, sec. 22, (2 Stat. So. Ca. 579,) it is expressly enacted that an avowant in replevin is not bound to state any thing more in his avowry than the lease or demise under which the tenant held. This Statute has not, it would seem, been expressly made of force in this State. Its provisions, however, have been so uniformly observed in practice, that it may be said to form a part of the law of the land. Indeed it seems to me to be but declaratory of the general principles regulating the relation of landlord and tenant.

Motion dismissed; GANTT, RICHARDSON and EARLE, JJ. concurring.

Magrath for the motion; *Hortbeck*, contra.

Thomas Napier & Co. vs. J. J. Gidiere, Executor.

A plaintiff, who had gone into both Courts upon the same demand, being put to his election, chose to proceed in Equity. Motion by his attorney, that his case at law be continued, was refused: he had to take a *non-suit* and pay costs.

Quere as to costs, if he had proceeded in the proper form of a *retrazit*; for which purpose he must have appeared in person, not by attorney. But a *retrazit* is a renunciation of the whole cause of action, and it is doubtful whether the plaintiff could afterwards have proceeded even in Equity.

Before EVANS, J. at Charleston, January Term, 1840.

In this case, an action had been brought in the court of Common Pleas, on a judgment of a foreign State. Afterwards a bill was filed in equity to discover assets, by calling on the defendant to account as executor. Upon the prayer of the defendant, the plaintiff was put to his election and chose to proceed in Equity. When his case was called for trial in the court of Law, he moved, by his attorney, "that the case stand continued until final decree in the court of Equity;" intending thereby to withdraw it from the docket without paying costs. But his Honor refused the motion, and required him either to proceed with his case, or take a *non-suit*.

From this order of the Court the plaintiff appealed.

Curia, per EARLE, J. A party plaintiff is not allowed to prosecute two actions at the same time against one defendant for the same cause. And, should he bring a second action without discontinuing the first, the defendant may plead *autre action pendent*, and the plaintiff will have the costs to pay. For the same reason that he shall not be allowed to do this at Law, he will not be permitted to maintain a suit in Equity and a suit at Law, at one and the same time, for the same cause of action. When the plaintiffs in this case, after suing the defendant at law, filed their Bill in Equity to enforce the same demand, that court, in conformity with the settled rule, required them to make their election to proceed

either in one court or in the other, because it would not entertain their bill there. if they persisted in their suit at Law. The plaintiffs, therefore, were obliged to let fall one suit or the other. Having made their election to proceed in Equity, they were obliged to let fall their action at Law.

But I understand the plaintiffs' counsel to insist that they had a right to do this in their own way, and without costs. I am not aware of any mode in which this can be done; nor have I met with authority for it in any precedent in any book of practice. There are three modes of voluntarily letting fall an action at law: 1st, by a *discontinuance*, which is allowed only on payment of costs,—2nd, by entering a *nol. pros.* on the record, which is also allowed only on payment of costs when it extends to the whole cause of action,—3rd, by a *retraxit*, the benefit of which is claimed, I understand, by the plaintiff here. This is done, by the plaintiff, when the cause is called for trial, coming in person into the court where his action is brought, and saying he will not proceed in it. It is so called from the form of the entry, which will be found in 2 Sellon's Practice, 338. "*Et prædict. quærens in propria persona sua venit et dicit quod ipse placitum suum præd. versus præd. defendent. ulterius proseguere non vult, sed abinde omino se retraxit.*" But it is also said that a *retraxit* must always be in person; if it is by attorney it is in error. (8 Rep. 53; 3 Salk. 245.) It will be perceived that the course pursued by the plaintiffs' attorney below was any thing but a *retraxit*, as the plaintiffs did not appear at all, and no entry was made on the record; besides, a *retraxit* is a very different thing from what he seems to have supposed. Instead of being a proceeding to withdraw the record from the court, and to transfer it to Equity, it is a proceeding by which the plaintiff withdraws himself from the action altogether. It is an open, voluntary and final renunciation of his suit in court, by which he forever loses his action. (2 Sell. Pr. 338; 3 Comm. 296.) If the plaintiffs here had, in proper person, entered a

formal *retraxit*, it may well be doubted whether they could have proceeded in Equity. As to the payment of costs on a *retraxit*, we will consider that when a case occurs. As the plaintiffs would not let fall their action in any of these forms, and yet refused to go on to trial, having elected to proceed in Equity, no alternative was left but to give the defendant this judgment of *non pros*.

The Court is of opinion that it was properly ordered, and the motion to set it aside is refused.

Motion dismissed; the whole Court concurring.

Hunt & Smith for the motion.

The State vs. Andrew Priester.

One count in an indictment charged the *buying of corn* from a slave, another the *selling of liquor*. The defendant, who was not a vendor of spirits by profession, had traded the liquor for the corn. A general verdict of guilty was held good; for the two counts charged the same act and the same offence.

It seems that it would have been otherwise, had the defendant been a distiller, vendor, or retailer by profession; for then, the offence in the *second* count would have been that created by A. A. 1834, while the *first* charged a violation of the A. A. 1817.

The words "distiller, vendor, or retailer," in the A. A. 1834, refer only to distillers, &c., by profession or habitual practice.

Two distinct offences with different penalties, may be charged in the same indictment; but care must be taken to have the verdict framed so as to secure the several counts.

Before EARLE, J. at Coosawhatchie, Spring Term, 1839.

The defendant was convicted upon an indictment which charged that he "did buy and purchase of and from a certain slave of Frederic Mole, named Frank, one bushel of Indian corn, of the value of one dollar, the said slave then and there

not having a permit to sell, from or under the hand of the said Frederick Mole, &c." And, in a second count, that he "did deal, trade and traffic" with the same slave, "by selling said slave Frank certain spirituous liquor, to wit, five quarts of rum, the said slave then and there not having a permit so to deal, trade or traffic, &c." Verdict, guilty.

The defendant appealed, and moved the Court in arrest of judgment, on the ground, that two distinct offences, viz. *buying corn* and *selling spirits* to a slave, were joined in one indictment. (2 M'C. R. 257.)

Curia, per EARLE, J. The defendant is indicted under the A. A. 1817, (p. 25,) for unlawfully trading with a slave. There are two counts in the indictment; one for buying from the slave a bushel of corn, the other, for selling him five quarts of rum. It was one transaction, and the Solicitor has only varied the statement so as to adapt the charge to the proof he was likely to make. He might prove that Frank had obtained the rum without being able to shew that he had exchanged the corn for it; or else, that he did exchange a bushel of corn for the rum; so that only one offence was committed, and that was under the Act of 1817.

It is supposed that the second count is framed under sec. 3, of the A. A. 1834, (p. 12.) That Act relates only to cases where a distiller, vendor, or retailer of spirituous liquors, sells, exchanges, gives, or otherwise delivers liquor to a slave. Now, it is true, in common parlance, that any one who sells an article is a vendor; but the Act was obviously intended only to embrace open and habitual vendors and licensed retailers; and the words, vendors and retailers, are used to designate that class of persons. Why the Legislature, in the case of a sale, or exchange of liquor to or with a slave, by the class of persons which would come within the provisions of the Act of 1817, against the unlawful dealing or trading with a slave, should have reduced the maximum of imprison-

ment from twelve to six months, and of the fine from \$1000, to \$100, it would require more sagacity than I possess to discover. It would certainly be as criminal and as mischievous in Andrew Priester, being a distiller, or licensed retailer, to give a slave a jug of rum for a bushel of corn, as it would be in a worthy citizen, pursuing neither of these respectable occupations, to give a slave 12 1-2 cents for a dozen of eggs, or a pair of shoes for a dozen chickens. Yet, the distiller, or retailer, as a proof, I suppose, of the high estimation in which his useful calling is held, can be made to suffer only one half of the imprisonment and to pay one tenth of the fine which the rigour of the Act of 1817 imposes on his less respectable neighbour. Andrew Priester, however, has not been indicted as a vendor, or retailer, and, to his misfortune, there was no proof of his being either, within the meaning of the Act of 1834, as we construe its terms. There is, therefore, no misjoinder, as has been supposed, of inconsistent charges, nor indeed of two distinct offences with different penalties. Even that, however, is allowable according to the strictest rules of criminal pleading; but care must be taken to have the verdict framed so as to secure the several counts.

Motion dismissed; the whole court concurring.

Hutson and Colcock & Hutson for the motion; *Edwards Solicitor*, contra.

*The State ex relatione W. Matthews vs. E. V. Toomer et al.
(A Court of Magistrates and Freeholders, of Christ Church
Parish.)*

A slave having been convicted by a court of Magistrates, &c., of Christ Church, of the murder of a slave, who received the mortal injury in that parish, but died in another, in the *same district*; execution of the sentence was arrested by prohibition.

The A. A. 1793, (1 F. 393; 5 Stat. So. Ca. 231,) providing, in case of mortal injury inflicted in one county or district, and death ensuing in another, that the trial shall be had where the death occurred, extends to the case of homicide of one slave by another.

In the case of offences cognizable by a parish magistracy, the principle of the Act is applicable to the separate parish jurisdictions, though in the same district.

The A. A. 1832, sec. 2, (p. 60,) concerning the trial of slaves, seems to be only of special application to the city of Charleston.

Before EVANS J. at Charleston, January, 1840.

Suggestion for prohibition. *Major*, a slave of the relator, was convicted by a court of Magistrates and Freeholders, in Christ Church parish, of the murder of *Mary*, the slave of Robert Howard, and was sentenced to be hung. The verdict was found by one Magistrate and three Freeholders, a bare majority; the other magistrate and two freeholders finding *manslaughter*. It appeared that the deceased had received the injuries in Christ Church parish, and was afterwards removed to Charleston, (St. Philip and St. Michael's parish,) where she died. These parishes are both in Charleston district.

A writ of prohibition was ordered, to prevent the execution of the sentence. The grounds for the motion, as considered by the court, were, 1st. That sentence of death was passed without an unanimous verdict of the freeholders. 2d. That the prisoner was not tried in the parish where the deceased had died.

"The A. A. 1832, sec. 2, (p. 60,) requires that the freeholders shall be unanimous in capital cases; but, on examining the series of Acts passed for organizing the peculiar magistracy of St. Philip's and St. Michael's, I am satisfied that they form a system which does not extend to any other part of the State. At first, I was inclined to give to this enactment a general operation, and I regret that I am constrained to come to a different conclusion. The words "principal magistrate" can have no meaning, unless in reference to the distinction of judicial and ministerial magistrates, which is unknown, except in the Acts which relate to these parishes.

"In the instance of a mortal wound given in one county, or district, and death ensuing in another, it was formerly somewhat doubtful where the trial should be had. But the A. A. 1793, (1 Faust, 293; 5 Stat. So. Ca. 231,) requires it to be in the county or district where the deceased died. Under the provisions of that Act, if the blow had been given in Georgetown and the deceased had died in Charleston, there is no doubt that the trial should have been in the latter. The magistracy of the parishes is local, and I should suppose that all offences by slaves, in any particular parish, would be within the exclusive jurisdiction of the magistrates and freeholders of that parish. The parishes stand towards each other, as to jurisdiction, in the same relation that the Circuit Court districts do. They are not mentioned in the Act of 1793, but I can see no reason why its provisions should not be extended to them in cases of conflict of jurisdiction, which it was intended to settle and declare. On this ground I am of opinion this prohibition should be granted."

The defendants appealed, and moved to set aside the writ.

Curia, per EARLE, J. The Act of 1793, was passed for the purpose of settling a doubtful question on an important subject. The terms are very general, and, perhaps, were not intended, at the time, to embrace the homicide of one slave

by another. At least, considering the policy of the country then, in regard to slaves, it may well be doubted whether such cases were contemplated at the time the Act was passed. Yet the terms are so broad and comprehensive, that they do, literally, embrace all cases of homicide. But the tendency of our modern legislation has been such as to promote a more favorable regard for the life of the slave, and we think the presiding Judge below was right in ordering the prohibition. The last clause of the Act, on a fair and liberal construction, applies as well to the trial of slaves as of white persons: "and the persons guilty of such striking or wounding, shall be tried by and before the same court as if the deceased had suffered the injury in the same county or district in which he died." Inasmuch, therefore, as the slave in question died in the parish of St. Philips and St. Michaels, and the jurisdiction of justices and freeholders is local, there would have been the same difficulty as existed at common Law, in regard to the proper place of trial. All the analogies of the law are in favor of the construction given by the Court below, and the claim of the relator here, is strengthened by the consideration that, if the accused were tried in St. Philips and St. Michael's, the verdict must have been unanimous. The judgment of the Circuit Court is affirmed.

The whole Court concurred.

Elliott for the appellant; *Elfe*, contra.

The State ex relatione J. Jenkins vs. Commissioners of Roads of St. Bartholomew's Parish.

Persons required by law to work on *Watt's Cut*, (Edisto Island,) are not exempt from ordinary road duty.

The road Act of 1825, (A. A. p. 29,) repeals all previously existing exemptions.

The Commissioners of roads have power to impose and collect fines of \$20, but no more.

The Commissioners are authorized (A. A. 1825, sec. 12,) to assess, in certain cases, to a larger amount, but no mode of *collecting* is prescribed.

Before EARLE, J. at Colleton, Spring Term, 1839.

The relator moved for a prohibition to restrain the Commissioners from collecting a fine of thirty-two dollars, imposed upon him for not making a return of his male slaves. The grounds taken in his suggestion were, 1st. That the Commissioners had not jurisdiction to impose a fine exceeding twenty dollars; 2d. That, by several ancient Acts of the Legislature, his hands were required to work on Watt's Cut and exempted from working on any other highway. (A. A. 1738, '51, '54, P. L. 156, 224, 237.)

The Court overruled the relator's second ground, but sustained his exception to the jurisdiction of the Commissioners, and granted the writ of prohibition. From this decision both parties appealed.

Curia, per EARLE, J. held that the exemption claimed by the relator was not authorized by the terms of the Acts referred to, and, at all events, that any such exemption was done away, as well by the general enactment, as by the repealing clause of the road Act of 1825, (p. 29.) On the question of jurisdiction, the Court said:

It is equally clear, in the opinion of the Court, that the Commissioners have no authority to issue an execution for any fine or penalty exceeding \$20. By the A. A. 1825, each

Board of Commissioners was constituted a court, for the trial of persons charged with any default, for which fine or penalty was imposed by that Act, not exceeding \$20; and their power to award execution was expressly limited to the same amount. By A. A. 1826, sec. 27, (p. 31,) the section of the Act of 1825 just referred to, was repealed, but the same authority to hear and determine in cases of default, when the fine, penalty, or forfeiture does not exceed \$20, was conferred on three Commissioners, who were likewise empowered to issue execution therefor. Their jurisdiction is expressly limited to \$20, and they cannot impose any larger sum. In what manner the Commissioners shall proceed to enforce the road laws when the fines and penalties shall exceed \$20, we are not called upon to decide. The Legislature has not prescribed any mode of proceeding; and whether the Commissioners shall prosecute by indictment, or bring their action of debt, is left to themselves to determine. And this is rendered the more remarkable by the 12th section of the Act of 1825, which provides that, if any inhabitant shall refuse or neglect to make a return to the Commissioners, of the number of his male slaves, liable to work on the roads, when called on to do so, the Commissioners shall be authorized to make an assessment on such defaulter, of \$4 for each slave so withheld; and they may do this from the best information they may be able to obtain. Such assessment may amount in some instances to a hundred, or several hundred dollars. Yet their decision seems intended to be final and conclusive, for no appeal is allowed. And I suppose they were left without the power to enforce their decision, unless by bringing their action, in order to enable the defaulter to submit his case to a jury—on the trial of which, I apprehend, the assessment made by the Commissioners would not be gainsaid or controverted. It is a strange anomaly, only pointed out, as in the case of *Priester*, (*Supra*, p. 103,) to enable those, whose province it is, to supply a corrective.

The Commissioners, having made their assessment, had no power to proceed farther, and, in issuing execution for \$32, we are constrained to hold with the Judge below, that they exceeded their jurisdiction, and that the prohibition was properly awarded, restraining the collection of more than \$20.

The whole Court concurred.

Carn for the relator; *Clarke*, contra.

William M. Murray vs. Daniel Moorer, Sheriff of Colleton District.

Seabrook, Administrator of Murray, vs. the same.

A fine of \$60 having been paid to the Sheriff, upon presentation (without levy) of an execution issuing from a Board of Commissioners of Roads, the Sheriff, who had the money still in his hands, was liable to an action of *indebitatus assumpsit* for the excess over \$20, (the limit of the Commissioners's jurisdiction. See *Supra*, p. 109.)

And, it seems, it would not have been otherwise, if the Sheriff had paid over the money.

Payment to the Sheriff, upon service (without actual levy) of an execution void for defect of jurisdiction, is not a voluntary payment.

Before BUTLER, J. at Walterboro', November, 1839.

"These were actions of *indebitatus assumpsit*, for sixty dollars each, brought in *sum. pro.* jurisdiction, to recover from the defendant money paid to him under the following circumstances: The plaintiffs own plantations and negroes in the parish of St. Bartholomew's; they reside, themselves, in St. John's Colleton. The Commissioners of roads of the former parish, required the plaintiffs to make a return of their negroes liable to road duty; failing to make such return, they were required to appear and shew cause why they should

not be fined according to law; and failing to appear, the plaintiffs were fined sixty dollars, for the default of fifteen hands each. For the purpose of collecting the money thus assessed, executions were lodged in the defendant's office on the 18th December, 1837, signed by the President of the Board, and witnessed by the Secretary. The plaintiffs paid the money without a levy, upon the executions being presented by the Sheriff, but wrote on them that they would sue for, and recover the money back, in the Court of Common Pleas.

"My opinion was, that the Commissioners of Roads had exceeded their jurisdiction, in issuing executions beyond twenty dollars, and that they might have been restrained from the enforcement of them by a writ of prohibition; but that, having paid the money, the plaintiffs could not have this action to recover it back. The law having prescribed the mode of redress, they should have pursued it. In the first instance, they should have resisted the liability to be fined, before the Commissioners; and if they had appeared, the fines would not, perhaps, have been imposed. Or if they did not choose to appear before a tribunal without jurisdiction, they should have restrained it by a prohibition. They thought proper to forbear using these preventive means which the law allowed, and to pay the money voluntarily, which I think was justly due by them. If all the money paid on judgments of limited jurisdictions, such as courts martial, justices of the peace, &c., and which might have been resisted at the time, for the want of legal authority to grant them, were recoverable, what mischief and litigation might it not lead to? The defendants were not compelled, in these cases, to pay the money: they did it voluntarily, for they could have resisted the payment. If the executions conferred on the Sheriff no valid authority to collect them, they could have restrained the sheriff himself, by giving him notice that they would apply for a writ of prohibition. As it is, they have subjected parties to costs, trouble and expense, who would not have incurred them if the proper measures had been taken by plaintiffs."

The plaintiffs moved the Court of Appeals to set aside the non-suit.

Curia, per EARLE, J. In *the State ex. rel. Jenkins vs. Commissioners of roads*, (*Supra.* p. 109,) it was held, on the construction of the Act of 1836, that the Commissioners have no jurisdiction to impose a fine or issue an execution above \$20. The question now presented is, can a person, having paid money to the sheriff, on an execution issued by the Commissioners for \$60, recover it back by suit at law. The difficulty which frequently arises, when money is received under void authority by an agent who has paid it over to his principal, does not arise here; for the sheriff has the money in his hands. Nor, in any case, I apprehend, would such a defence avail him, where he had collected money on a void process which he was not bound to obey. There can be no doubt that, in executing such process, the sheriff was a trespasser. It is equally indubitable that the parties against whom it had been issued might, by prohibition, have prevented it from being enforced; and hence it is contended, and was held by his Honor in the court below, that the payment of the money is to be regarded as a voluntary payment, which will not support an action. There is great force in the argument; especially when it is considered that the money was really due and might have been collected in a different form of proceeding; but our opinion is against it, both on principle and authority. If the money had been raised by a sale of goods under the execution, there can be no doubt that the party might have maintained trespass, as the execution was, in law, a nullity; or he might have waived the trespass and have brought his action for money had and received: (*Linden vs. Hooper*, Cowp. 419.) And we perceive no difference in principle, between such case and that where the party has paid on the demand of the sheriff, with an execution in his hand which he has threatened to enforce, or might reasonably have been expected to enforce. Cases are numerous, of

money recovered back, when paid on judgments that are afterwards reversed, or on summary convictions that are afterwards quashed. Such was *Feltham vs. Terry*, cited by Lord Mansfield in *Linden vs. Hooper*. And there seems to be the same propriety in allowing money to be recovered back when paid upon a judgment not merely erroneous, but absolutely null and void for want of jurisdiction. In 1 Ld. Raym. 742, the case was this. Sir Richard Newdigale had a donative, which he gave to the defendant Davy—afterwards he removed Davy and put in I. S. Davy cited Sir R. N. before the High Commissioners in the time of James II, who sentenced him to restore Davy, and to pay him all the arrears that had been received, which were paid accordingly. After the revolution Sir R. N. brought *indebitatus assumpsit* against Davy for this money, as received to his use. And it was held that the action did well lie, the money being paid in pursuance of a void authority. In *Snowden vs. Davis*, (1 Taunt. 358,) a bailiff, under colour of a distringas to the sheriff of Berks and a warrant from him, demanded and collected from the plaintiff several sums of money, some of which he had authority to collect, and some he had not. The plaintiff was allowed to recover back so much as the bailiff had no authority to distrain for; although, in fact, he had paid over the whole to the sheriff, and he to the Exchequer. It is true, the plaintiffs here did not appear before the Commissioners when summoned to answer for the default—and, after the execution issued, they might have restrained the sheriff by prohibition. But whilst they were in pursuit of a Judge to grant the writ, the sheriff might have sold their goods; and they are not to suffer from having acted under the belief that the Commissioners knew the extent of their jurisdiction, and would not issue an execution for an amount beyond it. They may reasonably have supposed, as their default was such as to incur a penalty above that amount, that the Commissioners would resort to an action to collect their assessment. It is

said in *Levy vs. Roberts*, (1 M'C. R. 395,) that a defendant, paying money to the sheriff on an execution, cannot be considered as paying it voluntarily; and so, we think, are all the authorities.

As the Commissioners, however, had authority to issue an execution for \$20, and as this action is to recover back what it is alleged they had no authority to collect, we think the plaintiffs should recover only the excess. The non-suit ordered by the Court below is set aside.

The whole Court concurred.

Carr for the motion; *Clarke*, contra.

William W. Williams vs. William B. Oliver.

In an action for the purchase money of a lot purchased after the Rail Road had been constructed through it, a previous agreement in writing not under seal, by the vendor, to convey to the Company a space through of fifty feet, if necessary, and the power to clear a hundred feet on each side, was not allowed to be set up in discount.

Such an agreement was not a covenant for the conveyance of the fee; but only of an easement, or right of way.

In discount to an action for the purchase money of land, the defendant must make out a valid, subsisting, outstanding, paramount title in another. An agreement to convey a part of the land (or, it seems, even a formal conveyance, if not duly recorded,) will not do.

An incumbrance of which the purchaser had notice could not be discounted against the purchase money.

Before EARLE, J. at Barnwell, Spring Term, 1839.

Assumpsit on two notes of hand drawn by the defendant, one for \$2000, and the other for \$500 payable to G. Perdue, or bearer, and transferred to the plaintiff.

The consideration was certain real estate in Aiken, purchased by defendant from Perdue, and known to the plaintiff,

who had sold the premises to Perdue, and took these notes of the defendant in payment of Perdue's debt to himself. The defence was an agreement, made by the plaintiff himself, before the sale of the premises to Perdue, with the South Carolina Rail Road Company, securing to the said Company certain privileges; with a covenant on his part, to convey to them a small portion of the premises on a contingency which, it was said, had happened. It was contended, that this agreement and covenant constituted an incumbrance, a subsisting, outstanding, paramount title, which entitled the defendant to an abatement from the price agreed to be given; part of which has been paid, this action being for the balance.

The Jury found the following special verdict:

"We find that the notes sued on, were given to G. H. Perdue, in part payment for a house and lot in Aiken, conveyed 6th August, 1834, which had been formerly sold and conveyed by the plaintiff to Perdue; that the notes were transferred to the plaintiff in payment of Perdue's debt, the plaintiff being present when they were drawn, and knowing the consideration for which they were given: we find that the plaintiff, on the 12th of March, 1830, before the date of his conveyance to Perdue, of the premises, or any sale or conveyance of any part thereof, under or by virtue of which the defendant derives title, made an agreement in writing, with the Rail Road Company, not under seal, that if they would carry their Rail Road through or contiguous to his land, in consideration of its being so carried or placed, and without any other compensation, he would convey to the said Company and their successors a space through (his land) of fifty feet in width, if so much be deemed necessary by the Company, and the power to clear and keep clear one hundred feet on each side of the Road, and granting to the Company the power of entering upon and using, without molestation, said land for the above purposes, as they may deem expedient; and for the full and faithful performance of such agreement, he bound himself, his executors, administrators and assigns.

"We find that fifty feet thus described, would include ten feet of the premises conveyed by plaintiff to Perdue, and then to defendant, along the entire front of the lot; and that one hundred feet would include part of the house erected on the lot, and used as a Hotel; the entire value of the premises being estimated at about eight thousand dollars, the Company having in fact made their Road through the plaintiff's land at that place. We further find, that the house has been built since the date of the agreement of the plaintiff with the Rail Road Company; and that the defendant has been, and is now, in the quiet enjoyment of the entire premises without molestation or disturbance.

"If the Court shall be of opinion that the agreement of the plaintiff with the Company, of March, 1830, creates a subsisting incumbrance or outstanding paramount title, and that the defendant may avail himself of it in this action, or claim an abatement of price on his notice of discount, then we find for the defendant. If the Court shall be of a different opinion, then we find for the plaintiff the sum of three thousand six hundred and sixty-four dollars and fifty cents."

After argument, the Court was of opinion, that the agreement or covenant of the plaintiff with the Rail Road Company, did not constitute, under the circumstances, such an incumbrance, or outstanding paramount title, as would entitle the defendant to an abatement, and ordered the *postea* to be delivered to the plaintiff.

The defendant moved the Court of Appeals to set aside this order, and for leave to enter judgment for the defendant.

Curia, per EARLE, J. To entitle the defendant to an abatement from the amount of his note, he should make out a valid, subsisting, outstanding, paramount title in another. It requires very little consideration to perceive, and very little argument to demonstrate, that the agreement of the plaintiff, with the Rail Road Company, forms no such outstanding

title. In the first place, it was no conveyance transferring title by which any interest vested in the Company; but only an executory agreement to convey; and, as it has not been executed by deed, the conveyance of the plaintiff to Perdue, and of Perdue to the defendant, vests the absolute unincumbered fee in the defendant. Had the agreement been a deed of conveyance formally executed in 1830, but not recorded, the subsequent conveyance to Perdue and to the defendant without notice, would be valid. If the defendant purchased *with* knowledge of the agreement, he cannot be allowed to set it up as a defence in this action, whatever effect it may have, but must be left to rely on the warranty contained in his deed.

The terms of the instrument, however, do not seem to import a covenant for the conveyance of the fee, nor indeed, of any interest in the soil. So far as regards the 50 feet in width, if so much be deemed necessary, it seems only intended to secure the Company a right of way, a space upon which to build the road, and for the purpose of the road. It seems only to have been an easement; and as the road was in the act of being constructed there at the time of the defendant's purchase and the conveyance from Perdue, he purchased with a knowledge of the privilege enjoyed by the Company. So far as regards the space of 100 feet, it is perfectly obvious that the only purpose of the intended grant was to protect the road from standing trees on either side. The ground here was already open, and, as the defendant built his house partly within the hundred feet, after his purchase, and in the face of the Company, who interposed no objection; whatever might be the nature or effect of the agreement, they could not now disturb the defendant's possession. In addition to all this, the defendant has ever been, and now is, in the quiet enjoyment of the entire premises, without molestation or disturbance. There is therefore, no ground, either by Law or Equity, on which his defence can stand. The *postea* was properly ordered to be delivered to the plaintiff.

Motion dismissed; the whole Court concurring.

Bellinger for the motion; *Patterson*, contra.

T. E. Scriven vs. William Heyward.

In an action of trespass on the case, involving a right to water privileges, the defendant's motion for a survey was granted, though the defendant declined to join.

A motion for a rule of survey, which the Court would not have hesitated to grant, having been refused in courtesy to the judge who had rejected the same application at the previous term, an appeal upon the motion was allowed, *pendente lite*.

Before BUTLER, J. at Coosawhatchie, Fall Term, 1839.

These were actions of trespass, involving the right to water privileges. The defendant moved for an order to survey the plaintiff's plantation and the adjoining lands of the defendant, and to take the level of the water course through the same.

The presiding judge would have granted the order without hesitation, but was deterred from so doing by courtesy for the decision of EARLE, J. who had refused it, at a previous term, because the defendant declined to join.

The defendant renewed his motion before the Appeal Court, while the case was yet depending.

Curia, per BUTLER, J. held that, under the peculiar circumstances of the case, the motion was properly brought up to this court. And, although the action was not technically a trespass to try titles, yet it involved the right to a privilege or easement that could not well be ascertained without a sur-

vey. It was an action to try titles to an incorporeal hereditament; and there was no good reason why a survey should not be ordered. The defendant's motion was therefore granted.

GANTT, RICHARDSON, O'NEALL and EARLE, JJ. concurred.

Colcock & Hutson for the motion.

The State vs. Andrew Montgomery and wife.

Upon joint indictment, under A. A. 1740, sec. 37, (P. L. 173,) against husband and wife, the former was acquitted, and the latter convicted and fined. The husband was held not to be liable for the penalty imposed on his wife.

Before EARLE, J. *at Charleston, May Term, 1839.*

"The defendant and his wife, were jointly indicted under the 37th section of the Act of 1740, (P. L. 173,) for killing a slave by undue correction. The husband was acquitted, but the wife convicted, and sentenced to pay the fine prescribed by the Act, to wit, \$350, currency, equivalent to \$214.28. This was a *scire facias*, on the judgment of the Court, to have execution for the fine against the husband. On the return of the *scire facias*, I considered that the State was not intitled to have execution against the husband for the fine imposed on the wife; and it was, accordingly, adjudged that Mr. Attorney take nothing by his motion, and that the *scire facias* be discharged.

"It is moved in the Court of Appeals, to reverse this judgment, and to award execution."

Ground of appeal:—That the husband, during coverture, is responsible for all the legal obligations of the wife; and is

therefore, liable for a *pecuniary* penalty imposed upon her, by the sentence of the Court, on her conviction for a misdemeanor."

Whatever may be the liabilities of the husband, on account of the obligations of the wife contracted before marriage, or in damages for her misconduct towards individuals afterwards, they are such as can be enforced only by action on the civil side of the court; and to such action the husband must be made a party. It has never been attempted to make the husband liable, by indictment on the criminal side of the court, for offences committed by the wife against the State; unless where the law would imply that she had acted under his control, or upon proof that she had acted by his command. On such proof, in a certain order of cases, he would be responsible and she would not.

Whether the offence charged here was one of which both could have been convicted, it is not material to inquire. The husband was acquitted; and the case stands as a separate prosecution of the wife for a public offence against the State. The punishment provided by law, is a pecuniary fine; and this the wife has been sentenced to pay. The verdict shews it to have been a case in which the husband was neither guilty himself, nor liable for the act of his wife. Upon what principle then, can he be held liable to pay the fine imposed on his wife, or, in other words, to suffer her punishment? For public offences, the wife, as an individual member of the community, is liable to be indicted as sole; and, as the state of marriage does not exempt her from prosecution separately, it would be a strange anomaly that the judgment could be enforced against the husband, who is neither an accomplice in her guilt, nor a party to the proceeding. It is said in Hawk. P. C. "If a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, (as he may be, generally, to any suit for a cause of action given by his wife,) and shall be liable to answer what

shall be recovered thereon." But this affords no authority for the proceeding in question. To make the husband answerable, he must be made a party to the action, or information, in which the recovery is had; whilst, here, the judgment was obtained separately against the wife; and the attempt to make the husband liable is by a supplementary process, afterwards, to enforce the judgment. If liable at all, he was so at first. To sustain this proceeding would be, in effect, to make the wife liable, as a single woman, notwithstanding the marriage, and to make the husband liable for her offence, in consequence of the marriage. This point was settled as long ago as the time of James I. By the several statutes of Elizabeth, against recusancy, it was provided, that the fines imposed by those statutes on persons who absented themselves from the established church, or attended mass, might be recovered by indictment at the suit of the Queen, or by action of debt, bill, plaint, or information, at the suit of an informer. In *Dr. Foster's case*, (11 Rep. 61.)—"a case," says Coke, "that concerned the glory of God and the honor of our religion,"—upon mature consideration of all the statutes of recusants, it was resolved by all the Judges, "that, forasmuch as the remedy of the Queen was by indictment, and the *feme covert* was only indicted, and the husband was not a party to it, he was not subject to the wife's forfeiture; for the husband shall never be charged for the act or default of his wife, but when he is made a party to the action, and judgment is given against him and his wife, as for the debt of the wife: but if a *feme covert* be indicted of trespass, riot, or other wrong, then the wife shall answer and shall be party to the judgment only; and therefore the fine set upon the wife, in such cases, shall not be levied upon the husband."

The case of the *King & Parker vs. Webb*, (Cro. Jac. 480,) is cited on the other side; but that was an information at the suit of the informer, and this point did not arise at all. The question made was, whether a *feme covert*, being convict-

ed by indictment at the King's suit, was liable to the suit of an informer upon 23 *Eliz.* after the year that she was convicted. It was said in argument, where the wife is convicted of recusancy, it is usual to seize the lands and leases, which her husband hath in her right, by exchequer process; but we are not enquiring whether there be any mode of subjecting the property of the wife, in the hands of the husband, to the payment of the fine imposed on her. It is enough that we are satisfied, on principle and authority, that he cannot be made to pay it out of his own property.

Motion dismissed; the whole Court concurring.

Bailey, Attorney General, for the motion; *Hunt*, contra.

John Frazier & Co. vs. The Fire and Marine Insurance Company of Charleston.

In an action on a policy of insurance of freight lost *in transitu*, the patroon, who was also owner of the boat, was not a competent witness to shew that the freight was lost by fire, so as to fix the liability of the insurers.

A fraudulent conversion of freight, by one who was both owner and master of the vessel, was not *barratry*; for *barratry* is a fraud against the owner.

Before BUTLER, J. at Charleston, January, 1839.

This was an action on a policy of insurance of thirty-three bales of cotton, consigned to the plaintiffs and shipped from Columbia to Charleston, on board an open boat of which one Jesse Floyd was both owner and master. Among other risks, the policy covered those of *fire* and *barratry* of the master, provided he was not consignee of the cargo. Floyd's testimony, taken by commission, was offered. The defendants objected that the owner, being a common carrier, might

be held liable for the loss of the cotton, and was not a competent witness. The Court overruled this objection, on the ground that a verdict for or against the underwriters, would not be evidence in an action, either by the shippers, or by the underwriters, against the carrier. Floyd's testimony was, that he was sole owner of the boat and the only white person on board of her, when the cotton took fire in the night and was utterly destroyed. The Court thought, from the other evidence, that the cotton had been fraudulently converted, by Floyd, to his own use; but charged the jury that such a fraud, under the circumstances, was not *barratry*.

The jury found for the plaintiffs, and the defendants moved the Court of Appeals for a new trial. The grounds of appeal, as considered by the Court, were,

That the testimony of Jesse Floyd was inadmissible, and,

That the fraudulent conduct of the master, if proved, did not sustain the verdict, for it was not *barratry*.

Curia, per BUTLER, J. The Court having come to the conclusion to grant defendants a new trial on the first ground, it is unnecessary to consider any other.

The first ground is, that Jesse Floyd, being owner of the boat, was not a competent witness against the defendants. Had Floyd occupied the relation of master to another who was the owner of the boat, he might have been a competent witness; but he was exclusively the owner of the boat, himself, and was liable to the freighter for negligence and non-delivery of the goods according to the bill of lading. As a witness, he might exonerate himself from this liability, by enabling the plaintiff to recover a judgment against the underwriters. Such a judgment, when satisfied, would be an effectual bar to the plaintiffs bringing an action against the owner. The interest of the witness coincided with that of the party calling him, and this is in general a good objection to his competency. On policies of insurance, a master, (much more an owner,) is not permitted to testify to such

fraudulent acts as would amount to barratry, by way of claim, or defence. Suppose the underwriters, there, had called the witness. The objection would have prevailed; and, if so, why is not the converse good?

This is a question which must be decided by authority. In the case of *Taylor vs. McVicar*, (6 Esp. C. 27,) Sir James Mansfield held that the master, being part owner, was not a competent witness for the assured, on goods, where the defence was deviation, because he was interested as owner to exonerate the ship from liability. I think the true principle is laid down in *Moorish vs. Foote*, (8 Taunt. 454; 2 Moore, 508.) The principle will appear from a recital of Lord Kenyon's opinion, in the case of *Rothero vs. Elton*, (Peake's C. 84,) noticed in Philips on evidence, but not fully reported. Gibbs, C. J. in the case of *Moorish vs. Foote*, quotes and explains this case with approbation. It was an action on a policy of insurance by the assured against the assurer: *Defence*, that the ship was not seaworthy. Lord Kenyon held that the ship owner was not a competent witness; because, if he proved that the ship was seaworthy, he relieved himself from an action by the plaintiffs, for furnishing them with an incompetent ship, to which he would have been otherwise liable. If the plaintiff had recovered a verdict against the underwriters, on the testimony of the witness, that the ship was staunch, they would forever have been silenced as to any action against the ship-owner, for loss arising from his providing them with a ship that was not seaworthy. The principle is this; witnesses are incompetent where they are directly interested in the event of a suit. The judge then went on to apply the principle to the case before him, which was a case for negligently driving a mail coach against plaintiff's wagon horse, whereby he died, and held that the plaintiff's waggoner was incompetent to prove the negligence of the defendant, because he was interested in the event of the suit, for if the plaintiff recovered on his testimony, the witness would be placed in a state of security.

Apply the principle of these cases to the one under consideration. If the plaintiffs were to recover, they could not sue Floyd, but would place him in a state of security, which he would not otherwise have occupied. For, until verdict against either the underwriters, or the owner of the ship, the freighter has a right to bring his action against either, and where it is a contest between them, neither should be a witness to charge the other. This general principle, I think, may be deduced from the authorities, which are somewhat conflicting on the subject. The conflict has arisen from the difference of circumstances which have distinguished the cases. The general principle seems to be acknowledged, but its application has not always been made with uniformity and precision. In the case of *Gevers vs. Mainwaring*, (3 Holt's C. 139,) all the authorities on this point are referred to by the reporter. In that case it was decided that a broker was a competent witness to prove a contract; but, in an action brought against the principal for negligence and misconduct, in the course of his employment in the purchase of certain bales of tobacco, the broker who made the contract for him could not be called to prove that there was no negligence or misconduct in the execution of it, without a release from the principal.

It may be in the power of the plaintiffs to prove, as I think was established in the trial below, that Floyd fraudulently converted the cotton to his own use, and, if this was barratry, it was a risk covered by the policy. Could this position be sustained, the verdict might stand independently of Floyd's testimony. But all the English and American authorities are against it. The general definition of barratry is a wrongful violation of trust by the *master and mariners* against the interest of the owner. It presupposes the relation of owner and master. In *Nutt & Bodeau*, (1 T. R. 330,) Lord Mansfield considered the point fully. He says, "the point to be considered is, whether barratry, in the sense in which it is used

in our policies of insurance, can be committed against any but the owner of the ship, and it is clear beyond contradiction, that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the *owners of the ship*. The words used are master and mariners, which are very particular. *An owner cannot commit barratry.* He may make himself liable, by fraudulent conduct, to the owner of the goods, but not as for barratry." Since this decision, the question has never been doubted in the English or American courts, but has been frequently recognized when the owner and master was the same person.

The motion for a new trial is granted.

The whole Court concurred.

Grimke for the motion ; *Thompson & Hunt*, contra.

J. W. Earle vs. Henry Middleton.

In case of eviction, the measure of damages, on the covenant of warranty, is the purchase money with interest from the date of the purchase.

"There is no case of eviction actually or constructively, by *paramount title*, where the party's right to interest could be defeated by the reception of the rents and profits."—*O'Neill, J.*

Before EARLE, J. at Charleston, June, 1839.

Action of covenant, on a warranty in a deed dated 18th May, 1820, by which defendant conveyed to G. W. Earle 1020 acres of land, for eight thousand dollars. The writ, declaration and verdict in an action, *Earle vs. Thompson*, were introduced. In that action, Middleton was vouch-
ed, and, by the verdict, 131 acres, parcel of the 1020 acres,

found to be the freehold of Thompson, the defendant. The writ in that case was issued on the 14th September, 1831.

E. B. Benson proved the land recovered by Thompson, to have appreciated in value. But at the time of the purchase, on a comparison of prices, supposing \$8000 to be the price of the whole plantation, the part in question was worth no more than four dollars per acre. Plaintiff had possession of the whole plantation till the eviction, but never cultivated this part.

His Honor instructed the jury, that the measure of damages was the purchase money and interest, and left it to them to say whether the interest should run from the purchase, or the eviction; and stated that, if the date of interest was to be regulated by circumstances, the circumstances of this case were such as to shew that interest should run from the time of eviction only. But the jury found for the plaintiff, 524 dollars; with interest from May, 1820.

The defendant appealed and moved for a new trial, unless the plaintiff would remit the interest from May, 1820, to September, 1831, on the following grounds:

That from the nature of a contract of indemnity, the compensation should be according to the prime cost, with interest from the time of loss, or eviction; and that this principle has been adopted as the rule of damages, by the Act of the Legislature, and his Honor, instead of leaving the matter to the jury, should have instructed them that interest could only be allowed from the time of eviction.

That if the date from which interest is to run be a question for the jury, the circumstances of this case afford no ground to allow interest from the time of the purchase; and that the verdict of the jury is partial, unjust, and against evidence, as well as against the charge of the Court.

Curia, per O'NEALL, J. In the case of *Bond vs. Quattlebaum*, (1 M'C. R. 584,) decided in 1822, Judge NORT said,

"It is now understood to be a settled rule of law that, when a person has been evicted of land, or what amounts to the same thing, when he is deprived of it by title paramount in another, although there has been no eviction, he is entitled to recover back the purchase money, *with interest*, and nothing more." "There may be," he adds, "cases where the rents and profits in the mean time will take away the claim of the party to interest." This last dictum, with unfeigned deference to every thing which was said by the great Judge whose words I have quoted, is, I think, erroneous. There is no case of eviction, actually, or constructively, *by paramount title*, where the party's right to interest would be defeated by the reception of the rents and profits. The defect reaches back to the beginning of his title, and the rents and profits which he has received are not those of his vendor, but those of a third person having the paramount title. The damages recovered in a case of actual eviction, or which may be recovered by an existing paramount title outstanding, are in the place of rents and profits, and represent them in legal contemplation.

The case of the vendee's title defeated by a mortgage, does not conflict with the principles I have stated. The mortgage is a mere incumbrance; it is by the foreclosure only, that the right of the mortgagor or his alienee is defeated, and it is, therefore, only an actual eviction under the decree of foreclosure that will entitle the vendee to damages on the covenant of warranty. It is *then*, that, through the defect in his title, his possession is defeated by actual eviction, and he can only have interest from that time. Such seems to be the purport of the decision in *Executors of Withers vs. Johnson*, April, 1830,* although that can hardly be regarded as

*That case is introduced here, as well for the better understanding of the present one, as on account of the citation of it in 2 Rice's Dig. 192, viz:

"Action of debt on bond for the purchase money of negroes—plea, *non est factum*: on the trial the defendant proved that the negroes purchased were taken away from him by virtue of a mortgage given by Withers, *before his sale to defendant*. The jury found for defendant, and the Court refused a new trial."

authority, for the two judges who concurred in the result differed materially in the reasoning by which they arrived at their conclusion, while the third member of the court (JOHNSON, J.) dissented from it; and, in the circuit court, GANTT, J. seems to have given no opinion on the law of the case.

The A. A. 1824, sec. 4, (p. 24,) enacts, in affirmance of the rule, as laid down in *Furman vs. Elmore*, (2 N. & M'C. R. 189,) *Bond vs. Quattlebaum*, and the other cases decided at law, "that, in any action or suit at law, or in equity, for reimbursement or damages, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest." Testing the case before us by this Act, or by the rule of law

Executors of R. F. Withers vs. William Johnson.
Before GANTT, J. at Georgetown, Spring Term, 1830.

This was an action on a bond for \$1000, part of the purchase money of certain land and negroes. The defendant pleaded *non est factum*, and proved that three of the negroes, value \$1110, had been taken from him, and sold under an elder mortgage, executed by the vendor.

Verdict for the defendant; from which the plaintiff appealed.

Curia, per RICHARDSON, J. The question for the court to decide is, can the general verdict for the defendant be supported. The defence to the bond of \$1000 was a failure of the whole consideration. This defence the jury have verified. The evidence shewed sufficiently, at least after the verdict, that \$1110 was the price to be paid for the three negroes: that some time after the sale to Johnson, the negroes were taken from him, by virtue of an elder mortgage given by Withers, without notice to Johnson, and sold; at what price is immaterial. It is enough that Johnson lost the negroes by the act of the vendor. The price to be paid was the measure of the bond, and must be the measure of the discount. If we stop here, Johnson ought to have had his bond of \$1000 and the balance of \$110 returned to him. And strictly speaking, the facts reported go no farther. But it appears from the facts involved in the case, or rather from inferences, though not reported, nor used at the trial, that Johnson had the labor of the negroes for some years. This labor, according to a very equitable rule, well established where there is no specific evidence, ought to amount per annum, to £10, or \$42, profit per head, and the strict legal verdict might have been for the difference between the value of the labor and the \$110 which Johnson paid for the three negroes, over and above the bond of \$1000. But this difference was neither proven nor insisted upon at the trial. Whereupon the jury

settled long before it was enacted, there can be no doubt that the jury adopted the true measure of damages, in giving to the plaintiff the proportion of the purchase money which the land recovered bore to the whole tract, with interest from the date of his deed.

Motion dismissed; the whole Court concurring,

Petigru & Lesesne for the motion.

found by their verdict that the whole consideration of the bond had failed. And when we consider that the whole fault of selling the negroes before mortgaged, lies at the door of the obligee, that Johnson had been obliged to suffer unexpectedly, a derangement of his contract, and possibly much inconvenience in the domestic relations of his negroes by the loss of three taken from him "nolens volens," the court does not feel itself urged by any strong principle of justice, or rule of law, to send the case back in order that the plaintiff may possibly get a small balance which he did not make plainly appear at the trial already had. And that too, when the verdict is by no means inequitable, and is supported by the evidence actually adduced.

The motion is dismissed. JOHNSON, J. dissented.

COLCOCK, J. I think it the plain case of a loss of property by a title paramount, and the defendant's plea is a suit for the recovery of the value of the property, which, according to the established law, is the price paid and interest, or the value of the labour in the case of negroes.

Executor of Joshua Hickman vs. R. W. King & Co.

A merchant agreed with the payee of a bill, who promised that certain produce of the drawer's, whose agent he was, should be sent to him, that he would honor his draft on that condition. The produce was not sent till after the bill had been dishonored and protested, and then only a part, with instructions from the owner to devote the proceeds to other purposes. The payee was non-suited in his action against the merchant, both as acceptor and for money had and received.

When it is doubtful whether a non-suit ought to be ordered, the Judge, on circuit, will sometimes, even against the inclination of his judgment, send the case to the jury. But the Appeal Court will not be restrained, by a verdict for the plaintiff, from opening the entire evidence to decide on the motion for non-suit.

Before EARLE, J. at Charleston, May Term, 1839.

This was an action of assumpsit against the defendants, as acceptors of a bill of exchange, with a count, also, for money had and received.

On December 29, 1836, Hickman wrote from Jacksonville, Florida, to the defendants, in Charleston; "Dr. Holland, who bought my place, has authorized me to say, that if you would pay me at sight, or thirty days, ten thousand dollars, you shall have his crop that I sold him at Mulberry Grove. If you agree to do it, you must let me know by the return of the mail. I will pay you the amount that I owe you out of the same—he has 66,000 weight of seed cotton in, and is ginning with two horse gins. I think that he will have it to market by the middle of February. He has 120 barrels of sugar, which you will get if you pay me ten thousand dollars." The defendants answered, January 4, 1837, "Please say in reply to Dr. Holland, that we shall be much gratified in having the sale of the produce of the plantation he bought from you, and so soon as he sends a bill of lading for the same, shipped to us, that we may effect insurance on the same, we will pay you the ten thousand dollars." On the 21st February, Dr. Holland drew upon the defendants in favor of Hickman, for

\$7,600. This draft the defendants refused to accept, because they had, as yet, received no shipment from Dr. Holland; and, at Hickman's request, they returned it protested in form. On the 31st March, the defendants received from Holland 16 bales of cotton, 36 barrels of sugar, and twenty-four barrels of molasses; and, on the 21st April, 14 bales of cotton, 2 of stained cotton, and 43 barrels of sugar. (It was in proof that 66,000 weight of seed cotton, ought to have turned out 60 bales:) At the same time Hickman renewed his claim upon the draft; but after some little negotiation and delay, the defendants finally refused to make him any advance whatever.

Here the plaintiff closed his case, and the defendants moved for a non-suit, on the grounds, 1st. that the defendants were not liable as acceptors of the bill of exchange, inasmuch as the acceptance was only conditional, and the condition was not performed upon which the liability would attach; 2d. that they were not liable, upon the count for money had and received, upon any supposition of an implied contract, because an express contract was proved, and because the bill of exchange did not specify the particular proceeds of the crop, as the fund out of which it was to be paid, and was, therefore, not an assignment of the crop or its proceeds. But the Court overruled the motion.

The defendants then proved that Hickman, as agent for Holland, had superintended the getting in of the crop in question, and that it was far short of what he had represented. They shewed that the nett proceeds of what had come into their hands was \$4.236 98; of which, Holland had contracted an account with them for the greater part, and, on May 6, 1837, had drawn upon them in favor of a house in Savannah, for the residue.

The Court instructed the jury, that the defendants could not be held liable to the plaintiff as acceptors of the bill of exchange; the acceptance having been conditional, and the

condition to be performed by Holland not having been complied with : that, on the count for money had and received, the plaintiff might be entitled to recover, or not, according to the view they should take of the circumstances of the transaction. The Court considered the draft drawn by Holland, (which, it seemed to be admitted on all hands, was drawn upon the crop,) as constituting an equitable assignment of the proceeds of the crop; yet, that it was not such as to enable the plaintiff to maintain an action at law; and that the defendants could only be made liable in this action, by some act on their part, before or after the crop came to their hands, by which they agreed or consented to hold the crop or its proceeds for Hickman's use. In that case, if the defendants, at the time of the shipment of the crop, had directions from Holland to pay the proceeds to Hickman, the plaintiff might recover for money had and received to the use of Hickman. The facts were left entirely to the jury. Verdict for the plaintiff, \$4,627 27.

The defendants appealed, and renewed their motion for a non-suit.

Curia, per RICHARDSON, J. If the condition upon which King & Co. promised to accept the draft of Dr. Holland, was practically fulfilled, it is not to be questioned that King & Co. are as liable as if they had accepted the draft. *Mason vs. Hunt*, (1 Doug. 297.) It is equally clear that, if Dr. Holland, in the course of the negotiations and arrangements made for meeting the payment of his draft, placed money in the hands of King & Co. for that purpose, then too, King & Co. may be made liable for the money so received for Hickman. These legal propositions are undeniable; and, the jury having found that King & Co. did receive the proceeds of the Doctor's crop for the payment of his debt to Hickman, the questions for the Court to decide arise out of the state of facts, from which the jury drew the inference that King & Co. had received such proceeds for that purpose. We have,

then, to enquire, 1st. whether the condition was fulfilled, entire, so as to compel King & Co. to pay the draft; or, 2nd, was it fulfilled in part, so as to render them liable for money received for the use of Hickman.

The facts are almost as plain as the law of the case. In answer to Mr. Hickman's letter of the 29th December, 1836, King & Co., by their letter of the 4th January, 1837, contracted with Hickman to accept the draft of Dr. Holland for \$10,000, provided the Doctor should send them 66,000 lbs. of seed cotton—equal to about 60 bales of ginned cotton—and also 120 barrels of sugar. Accordingly, on the 20th February, Dr. Holland drew in favor of Hickman; for \$7,600. This draft was returned to Hickman, on the 17th March, duly protested, because the cotton and sugar had not been transmitted to King & Co., or placed within their control, according to their contract of the 4th of January. At this period, no one can suppose that King & Co. were in any way bound to pay the draft.

Afterwards, however, some cotton and sugar were sent, which would seem to be a partial fulfilment of the condition required by King & Co. But it should be borne in mind, that Hickman, only acting apparently as the agent of Dr. Holland, made the representation of his crop to King & Co., and promised the consignment to them for a certain purpose; whereas, the cotton and sugar were shipped by Dr. Holland himself, without notice of the supposed purpose, and he received the usual advances in such cases; which left a balance of only \$1,637 out of the sales of \$4,236 98. Holland also demanded this balance, and finally assigned it to a person in Savannah, after King & Co. had refused to accept his draft to G. Anderson & Son. Here we have a total failure, if not an absolute contradiction, of the consignment to meet the bill, as promised by Hickman. It would seem, from such evidence of his intentions, that Dr. Holland never placed his cotton and sugar at the discretion of King & Co., or con-

sidered his crop as pledged in their hands to pay the draft to Hickman. On the contrary, he appears, by his whole conduct, to have repudiated the arrangement, which had been made in his name by Hickman, to meet the draft of \$7,600. This course, we may presume, was adopted upon the protest of the draft on the 17th March by King & Co. For, although King & Co. afterwards received 30 bales of cotton and 79 barrels of sugar of Dr. Holland, yet these, if we may judge from the use made of the proceeds by Dr. Holland, were placed in their hands for other purposes than to pay the protested draft. What could King & Co. do? They had no discretionary power over the cotton and sugar of Dr. Holland. Unless authorized by him, they could not pay over the amount of sales to the protested draft, or to Hickman: because Hickman himself, (not Holland,) had engaged that Holland's crop should be consigned to them to meet the draft.

It is very rational to presume that Dr. Holland had promised Hickman to fulfil the engagement made in his name, in order to induce King & Co. to honor his draft: But it is clear, from the evidence, that he did not consign any cotton and sugar for such purposes. For some cause, Dr. Holland did not recognize or fulfil the terms and conditions held out by Hickman in his letter of 29th December, 1837, upon which King & Co. promised to accept the draft to Hickman.

It is vain to urge that this was the fault of Holland, not of Hickman. That may or may not be. It is enough that the condition upon which King & Co. engaged to accept the draft of Dr. Holland in favor of Hickman did fail. King & Co. did not make the contract with Dr. Holland. They relied upon Hickman, and his warranty was, that Holland would ship the cotton and sugar, for the purpose which he (Hickman) promised, to King & Co. The failure, then, has been entirely in the condition promised on the part of Hickman. And King & Co. continued, throughout the whole transaction, in the same situation in which they were at the

time they first protested the draft of \$7,600. It does not appear that they ever had any of Holland's money that they could legally credit to Hickman. Such an idea can only arise from assuming that Holland shipped his cotton and sugar to King & Co. in order to fulfil the promise of Hickman that Holland would do so for a certain purpose. But it is evident, whatever may have been the understanding between them, that Holland kept his cotton and sugar under his own control and used the proceeds for other purposes.

Where then is the evidence that King & Co. ever had authority to apply the proceeds of Holland's cotton and sugar to the credit of Hickman? We have, it is true, the assurance of Hickman that the cotton and sugar would be consigned for that purpose by Holland. But Holland himself, appears to have discarded every idea of the kind, although he employed King & Co. as his factors. Who then must suffer? Not King & Co., but Hickman, who failed to induce Holland to consign his cotton and sugar for the purpose of meeting his draft. We are unable, therefore, to perceive, in the evidence before us, that the conditional promise made by King & Co. to accept the draft, was at any time binding upon them; because the condition was never fulfilled, either to the amount of the draft, or to the extent of the proceeds of Holland's cotton and sugar. Such proceeds, it is true, passed through their hands as Holland's factors. But they were never placed, by Holland, in the hands of King & Co. to meet the engagement promised by Hickman in the name of Holland. Between the promise of Hickman, of what the Doctor would do, and the non-performance by the Doctor himself, the condition was never fulfilled, and King & Co. were kept in suspense and powerless from the beginning to the end of the transaction.

It may be difficult to account for such non-conformity between the Doctor's action and Hickman's word. But assuredly, it does not fall on King & Co. to reconcile their misunderstanding. King & Co. had nothing to do but to receive

the cotton and sugar of Holland, either as his factors, or upon such terms as he, not Hickman, might direct. Whereas, the plaintiff's action is bottomed upon the assumption that, if Holland sent his crop to King & Co. at all, the proceeds must go to pay his debt to Hickman, upon Hickman's word, with or without the direction of Holland. That is to say, the promise of the imputed agent, Hickman, is to control the conduct and direction of the actual principal, Holland. And that is to be done, too, to support his action against a new set of debtors, King & Co., in place of Dr. Holland. If Holland had simply consigned his sugar and cotton to King & Co., there would have been reason, under attending circumstances, to imply his assent that the proceeds should go to pay his debt to Hickman; and in this way, a privity between Hickman and the defendants, as to such proceeds, might have been constituted to support the verdict for money received for Hickman. But it belongs to the owner and consignor to direct the appropriation of his consignment, and we cannot imply his assent to a particular appropriation, when he has himself plainly dissented by making a different appropriation. Assuredly, King & Co. could not, upon the promise of Hickman, have resisted a suit brought by Holland for the balance of his crop in their hands: And if so, Hickman cannot recover the same money.

The reasoning and doctrine of the decision in *Williams vs. Everett*, (14 East. 581,) and the cases referred to, are authoritative, if not conclusive of this case. Such precedents are constituent parts of sound judicial decisions at common law, and belong to the full hearing which common law awards to all parts. It was doubtless upon this last consideration that the Circuit Judge refused a non-suit in the case before us. That is the usual course of our courts in cases of complexity, through caution; because, when the Judge and jury concur, after a full hearing, the decision often *satisfies* the losing party. Upon the subject of judicial decision,

I would observe, that we would have the trial by jury, in the language of our constitution, "as heretofore used in this State, forever inviolably preserved." It affords, perhaps, the most important practical check upon power, found in the State constitution. But the qualifying terms "as heretofore used in this State," have their place. And wherever a verdict of indebtedness has been rendered for a plaintiff, whose case is incompetent in itself to constitute the essential premises of such a verdict, there is a counter and conservative check, "as heretofore used in this State," which must also be inviolably preserved. Otherwise, the very veneration, now so justly felt for jury trials, would become a mere name to impose upon the weak and unreflecting. And the court being unanimously of opinion, in the case before us, that there is nothing in the evidence to warrant a verdict for the representatives of Mr. Hickman against King & Co., whatever may be the merits of their claims upon Holland, the non-suit moved for on the circuit is granted.

GANTT, EARLE and BUTLER, JJ. concurred.

Peronneau, Mazyck & Finley for the motion.

Susan M. Cleary vs. Andrew M'Dowall and others.

Where a settlement of real estate was made to the use of husband and wife, during their joint lives, then to the use of the survivor for life, with limitations over, the surviving widow took a freehold estate for life.

Where a woman, seized of a freehold in land for life, married, and during the coverture the land was levied on, and sold under an execution against the husband, who afterwards died, the widow surviving; held that the purchaser only took an estate for the life of the husband, and at his death, the widow was entitled to the remainder of her estate.

Before O'NEALL, J. at Charleston, January, 1840.

Trespass to try title. The facts were found, by a special verdict, to the following effect :

The plaintiff, being seized of the land in question, conveyed it by deed of marriage settlement, before her marriage with one Graves, to trustees, "in trust, (after the solemnization of the said marriage,) for the joint use and behoof of the said Samuel Colleton Graves and Susan McPherson, and their assigns, for and during the term of their joint lives, to permit and suffer the said Samuel C. Graves, alone, during the said term, to receive and take the rents, issues, and profits of the said real and personal property, to and for the joint use, benefit and behoof, nevertheless, of both of them, the the said Samuel C. Graves and Susan; and from and immediately after the death of either of them, leaving issue alive of the said intended marriage, then to the use, intent, and purpose, that the survivor of them the said Samuel Colleton and Susan, and his or her assigns, shall and may, for and during the term of his or her natural life, have, take, and receive, to and for his or her own proper use and behoof, the rents, issues and profits of the said real and personal property; and from and immediately after the determination of that estate, then to the use of the said trustees, or the survivor, or the survivors of them, for and during the life of the survivor of them the said Samuel Colleton and Susan, upon trust, to preserve the contingent remainders hereinafter limited from being defeated, and for that purpose to make entries, and bring actions, as occasion may require; but nevertheless in trust to permit the survivor of them the said Samuel and Susan, during the natural life of such survivor, to receive and take the rents, issues, and profits of the said premises, to and for his or her use and benefit, as aforesaid. And from and after the death of such survivor, then in trust to have and to hold all and singular the said premises, to and for the sole

use, benefit, and behoof of the eldest son of the said marriage, living at the time of the death of the survivor of the said Samuel Colleton and Susan, his heirs, executors, administrators and assigns forever; and should there be no son living at the time aforesaid, then in trust to have and to hold the said premises to and for the sole use, benefit and behoof of the eldest daughter of the said marriage, living at the time of the death of the survivor of them, the said Samuel Colleton and Susan, and to her heirs, executors, administrators and assigns forever; but in case that on the death of them, the said Samuel Colleton and Susan, there should be at the time of such death no issue of the said marriage living, then the said premises to the use of the said Susan, or her heirs, executors, administrators and assigns, forever;" with other contingent limitations, not material to the issue. After the marriage, Graves and the plaintiff entered on the premises, and received the rents and profits jointly, till Graves died, leaving one child of the marriage living. The plaintiff then kept possession and enjoyed the rents and profits, and afterwards married Nathaniel Greene Cleary. Some years after, the land was taken in execution by virtue of a *fi. fa.* upon a judgment in common pleas against Cleary, and "all the right title and interest of the said N. G. Cleary in the same," was conveyed, by the sheriff of Colleton, to the present defendants. Cleary died in December, 1838, and this action was brought by his surviving widow, to recover the premises and mesne profits from January 1, 1839.

The case being submitted on this finding of the facts, the Court ordered the *postea* to be delivered to the plaintiff.

The defendants appealed, upon the ground that the plaintiff had had a life estate in the premises, which, by her marriage, vested in her husband, N. G. Cleary, and passed, under the sheriff's sale, to the defendants.

Curia, per BUTLER, J. The deed under which the plaintiff claims in this case, has received a judicial construction

in the case of *Pringle et al. vs. Allen*. (1 Hill Ch. R. 135.) The question was, what interest Mrs. Cleary had in a negro which she held under the deed at the time of her intermarriage with Cleary; and it was held that she had a life estate, which was subject to levy under an execution against her husband. The negro, among others, was subject to a trust of a settlement, whereby a large number of negroes and some land (the land now in controversy) were conveyed by Mrs. Cleary to trustees, for the use of Samuel C. Graves, her intended husband, and herself, during their joint lives, and to the use of the survivor for life, and after the death of the survivor, then to the issue of the marriage. Neither the negroes nor the land were ever in possession of the trustees. Mrs. Cleary, at the death of her husband, (Graves,) was in the possession of the land, and in the enjoyment of the rents and profits. She had a freehold interest in it; not under an executory trust, by which the trustees were to receive and pay over the rents and profits to her, but under an executed trust and free from all control of the trustees.

Such an interest could be, and it has been, sold under a *fi. fa.*; and all the interest the defendants have in the land is under a sheriff's deed, founded on the *fi. fa.* against Cleary. Cleary being dead, his surviving widow has a right to the possession of the land. She has asserted her right in this action, and the defendants cannot be permitted to defeat it by denying the title under which they entered. They took it as an executed trust, and cannot now contend that it was executory and not subject to levy and sale; for, had it been so, they ought to have taken nothing by their purchase. *Cestui que use* has a right to the immediate possession and enjoyment of the land; the use is transferred to the possession, according to the statute of uses; where the trustee is to receive and pay over to the *cestui que trust* the rents and profits, the legal estate is in the trustee. For this general proposition, there can be no necessity to quote authority.

We think the action well brought, and dismiss the motion.
GANTT and EARLE, JJ. concurred.

Hunt & Memminger for the motion.

*Charles Jarvis, assignee of the Sheriff of Charleston, vs.
Samuel Alexander.*

There being, in this State, no *ca. sa.* against a female, the return of *nulla bona*, upon a *fi. fa.*, is sufficient to authorize proceedings against the bail of a female defendant who has not been surrendered.

The bail of a female defendant undertake, not only for her appearance, but that she shall abide by and perform the judgment of the court: but they may discharge themselves by a surrender of her person.

Bail to the sheriff is not converted, by A. A. 1809, into bail to the action for all purposes.

Before BUTLER, J. at Charleston, January, 1839.

This was an action of debt, upon the bond of the defendant, as bail of Lydia Giberson. The declaration stated that judgment had been recovered against the defendant in the original action; that, as she was a female, the only enforceable execution that the law allowed, a *fi. fa.*, had been lodged in the sheriff's office, and that the sheriff had returned thereon *nulla bona*; that the said defendant had not surrendered herself, nor had she been surrendered by her bail, and that, in consequence, the liability of the bail was fixed. To this declaration, the defendant filed a general demurrer, which was overruled by the court. From that decision of the court, the defendant appealed.

MAZYCK, for the motion, said that, by A. A. 1809, (p. 30,) the bail to the sheriff was, in fact, converted into bail to the

action, (*Stevens vs. Meeds*, 1 Const. R. M. 318; *Loker vs. Antonio*, 4 M'C. R. 175; *Harwood vs. Robertson*, 2 Hill R. 336,) and that the A. A. 1785, (P. L. 369,) and the whole law on the subject of bail to the sheriff, was rendered obsolete. The appellant's responsibility, therefore, was that of bail to the action. As such, his engagement was that the plaintiff should be paid, or that the defendant should be forthcoming to the process of the court; his liability would be fixed when it appeared that she was not within the reach of that process, (*Petersdorff on Bail* 289; 1 Attorney's Pocket Book, 117, 120;) and the way to make this appear was by *non est inventus* returned upon a *ca. sa.* As the A. A. 1824, (p. 23; 6 Stat. So. Ca. 237,) had deprived the plaintiff of that proof, perhaps inferior evidence might have been admitted; but the fact, however proved, was essential, and was not averred in the declaration. The return of *nulla bona* on a *fi. fa.* was quite irrelevant as evidence to this purpose. If the bail was liable upon a mere return of *nulla bona*, then he was a surety at all events for the debt; and under that doctrine, every female defendant would be held to bail, while the difficulty of obtaining it would be infinitely increased. It was suggested that the bail might discharge his liability by a surrender before the return *nulla bona*: but, if before the return, why not after? If he was surety for the debt, no surrender could discharge him; but, if surety for defendant's forthcoming to the process of the court, her having no property to satisfy the judgment was no default to make him liable. The bail was, in fact, discharged as soon as judgment was had against his principal; for after that, there was no further process against a *feme* defendant, and the sheriff could not have detained her if she had been in his custody. If it was otherwise, how long could he detain her? 'till she paid the debt, or took the benefit of the insolvent laws? Then nothing was left, of the exemption from the *ca. sa.*, except that the lien of the judgment and execution was not dissolved, and the law intended to relieve her sex

became an instrument of oppression. The power of the bail, then, being co-extensive with that of the sheriff, (2 Com. Dig. 3,) determined, as his did, with the judgment; and it was law, as well as common sense, that the obligation which had become impossible was discharged; as where a principal died, was made a peer, &c. (Petersdorff on bail, 389, 394; ——— vs. *Shirley*, Douglas R. 45; *Langridge vs. Flood*, 1 Tidd, 314;) but if he *had* the power, the surrender would have been an idle ceremony. The doctrine here advocated could alone effect the humane intention of A. A. 1824, and did not disturb the decision in *Desprang vs. Davis*, (3 M'C. R. 16,) which might stand independent of it.

YEADON, *contra*, urged that bail to the sheriff was not turned into bail to the action for *all purposes*; but only in respect to the rights, privileges and powers of the latter, which were superadded to the obligations of the former, without either being abolished; and this was all that was intended by the general expressions in *Stevens vs. Meeds*, (1 Hill R. 318,) and other cases. That they did exist distinct, was proved by the practice of discharging a prisoner, when surrendered by bail to the sheriff, on his giving bail to the action, and was settled in *Chiswell vs. Ellzey*, (Rice R. 29,) where the right of bail to the sheriff, was fully recognized, to surrender their principal previous to that stage of the case when bail to the action would have been necessary, and therefore, without ever becoming bail to the action. The obligation of the one was for his principal's *appearance* to the action, which can only be effected by entering bail to the action; (*Harwood vs. Robertson*, 2 Hill R. 336; 1 Sellon's Practice, 137;) that of the other was "to satisfy plaintiff his debt and costs, or to render their principal into his custody, provided judgment should be had against defendant, and defendant himself should fail to do so." (Sellon, *ibid.*) To ascertain the true doctrine of this case, the statutes on the subject must be construed together. The A. A. 1785, gives the plaintiff his *sci.*

fa. against the bail to the sheriff, "if the sheriff shall return upon the execution that the defendant is not to be found, or has no effects whereon to levy the debt and costs;" but under A. A. 1809, "among the rights, privileges and powers of special bail," the bail to the sheriff acquired that of their liability not being fixed till after a return of *non est.* upon a *ca. sa.* This privilege the A. A. 1824 afterwards repealed, in the case of female defendants, by abolishing the process on which it was founded. But the obligation, even of bail to the action, was "to render the body of their principal to his, the sheriff's custody," (Sellon, *ut supra* and 2 *Id.* 44)—not that she should be forthcoming to a *ca. sa.*—and the declaration averred the return, *nulla bona*, and the *refusal* to render, as the best evidence the case admitted of the breach of that obligation. The return of *nulla bona* did not fix the bail as a surety for the debt; he might yet discharge himself by a timely surrender. The principle of the bail being discharged of his obligation by its impossibility, (1 Sellon, 167,) applied where the impediment was subsequent to the obligation, not where it existed and was known before: but there was no impossibility; for the sheriff not only could, but must have detained the female defendant in his custody. He could not have discharged her unless by virtue of the insolvent laws, or of a Judge's order. A contrary doctrine would involve the absurdity of imprisonment on suspicion of debt, and immediate release upon proof of it. The holding to bail would be a mockery, and the decision in *Desprang vs. Davis*, if not overruled, would be absurdly evaded. But, above all, in *Jarvis vs. Gibberson*, (Dudley R. 223,) the Court had refused the application of the party now defendant, to enter an *exoneretur* on this very bail bond, because "the bond must still stand as the security of the defendant to answer in some shape the judgment and execution." Thus the words of the Court had invited the plaintiff to the course which he had adopted, for what *execution* was there to be answered, if not the *fi. fa.*?

Curia, per O'NEALL, J. The 4th section of A. A. 1824, (p. 28,) provides "that no female shall hereafter be liable to be arrested by any writ of *capias ad satisfaciendum*." The case of *Desprang vs. Davis*, (3 M'C. R. 16,) decided in, Charleston, at the February term succeeding that enactment, ruled that this Act did not exempt a female from arrest under a bail writ. In the case of *Jarvis vs. Gibberson*, (Dudley R. 225,) where the principal in this case was defendant, it was held that an *exoneretur* could not be entered on her bail bond. Looking to those cases that have given construction to the Act of 1824, we find that, against a female, the writ of *ca. sa.* is abolished, but still, that she may be arrested and let to bail under a *capias ad respondendum*. The question before us is, what is the effect of bail thus taken? Usually, bail to the sheriff is bail to the action, and his undertaking is, that the defendant shall remain within the reach of the process of satisfaction of the court. (*Saunders vs. Hughes*, 2 Bailey R. 513.) Against females, no process of satisfaction can be issued, and, hence, that cannot be the meaning of the condition for her appearance which constitutes the undertaking of bail to the action. If it were otherwise, taking bail would be a mere idle ceremony, and would be as well accomplished by the fictitious bail, John Doe and Richard Roe, as by men of substance like the defendant. But the law requires no such vain and idle ceremony. In the case of a female defendant, may not the undertaking of the bail for her appearance at the return of the writ, mean something else than that which is undertaken by bail to the action? I think it does.

The 3rd sec. of A. A. 1809, (p. 60,) declares that bail to the sheriff shall have all the rights, privileges and powers of special bail. The term special bail, as here used, was intended to have the sense attached to it in the county court Act of 1785, (P. L. 369,) where the person or persons becoming special bail, are declared to be made liable to the judgment and recovery, unless the body of the defendant be

rendered in execution. The defendant has all the rights, privileges and powers of special bail, in exoneration of himself: he may surrender his principal, or she may surrender herself. When this is the case, does it not follow—if, for the purpose of giving effect to the law, it be necessary,—that the liability incurred is co-extensive with the rights and powers arising out of it? I think this is the rule of reason, and of common sense, which is another name for the common law. No other construction can be resorted to, which will make the bail of a female have any effect. By the adoption of it, the bail is subjected to no liability which he may not discharge by surrendering his principal; so that there can be no hardship.

In *Harwood vs. Robertson*, (2 Hill R. 36,) it is said that the Acts of 1785 and 1809, have turned bail to the sheriff into bail to the action, or special bail. This case is to be the first illustration of what is meant by turning bail to the sheriff into special bail. Were it not for the Act of 1785, I should hesitate long in saying that bail to the sheriff ever could be regarded as special bail; but, coupling the Acts of 1785 and 1824 together, I think we may fairly say that the bail of a female undertakes for her appearance, and that she shall abide by and perform the judgment of the court. The 10th sec. of the A. A. 1785, protects the bail from suit until judgment and execution against the defendant and a return of *nulla bona*. When these things are done, it is plain that the defendant has not abided by and performed the judgment by paying it. The motion to reverse the decision of the Court below is dismissed.

RICHARDSON, EVANS and EARLE, JJ. concurred.*

* This opinion and the succeeding one, are the only two of this term signed by EVANS, J. His Honor was absent during the whole term, on circuit duty.

R. S. Millar vs. Hilliard & Wade.

The measure of a verdict for breach of contract, should be the damage that the injured party may reasonably have incurred. And the court will not restrain the discretion of the jury unless it clearly exceeds this limit.

Plaintiff baked certain bread, under directions to go on baking until ordered to stop, and told the defendant his bread was ready; the latter refused to take it, saying he did not want it then. The plaintiff's remedy was damages for breach of contract, not an action for goods sold and delivered; and his book entries were not admissible in evidence. (*Note.*)

But if, there had been a delivery and acceptance, under a similar order, in a previous transaction not yet settled, that might perhaps constitute a constructive delivery.

Before EARLE, J. at Charleston, May Term, 1839.

This was an action of assumpsit, for not accepting and paying for a quantity of pilot bread, baked for the defendants. The report of the Judge below was as follows:

"The plaintiff is a baker; and had baked for, and delivered to, the defendants, who were extensive dealers, large quantities of bread, which was sent for and received by the defendants at their own premises. On 10th February, 1838, previous transactions remaining unsettled, the defendants gave an order to the plaintiff "to go on and bake as fast as possible, until he was ordered to stop." Upon this order the plaintiff continued to bake, without receiving orders to the contrary, until he had 417 barrels ready for delivery, of which notice was given to the defendants, who replied, that they did not want the bread then, but might want it in a month's time: at the end of that period a second notice was given by the plaintiff, and the defendants persisted in refusing to receive the bread. There was no price agreed on, and no specific quantity ordered.

"The plaintiff employed an extra number of hands, and within twenty days after the order, the whole quantity for which payment was claimed, was packed, weighed, marked,

and ready for delivery. When refused by the defendants, it was stored away; no attempt was made to make sale of it, and it was retained by the plaintiff, until rendered worthless by the weevil.

"The only question was, what damages the plaintiff should recover. The defendants had paid 8 cents per lb. for the bread which they had received of the plaintiff; and at the time when the 417 barrels should have been accepted, i. e. from the middle to the last of March, such bread might have been sold for 8 or 9 cents. In the opinion of one witness, 400 barrels might have been disposed of at $8\frac{1}{2}$ cents. The market was fair for such bread up to July, when it became dull, and remained so during the season. Pilot bread well baked and packed in February, would continue nearly or quite as good until June; and one witness sold, in July, bread baked in February, and it was sound and good. It seemed from the evidence of a judicious auctioneer, that bread sold at auction would not be apt to bring more than a very reduced price.

"The plaintiff doubtless retained the bread under the impression that it belonged to the defendants, and that he was entitled to the full price, as for an article delivered and accepted. I gave the jury full instructions on the question of damages, which are not excepted to and therefore need not be repeated. The plaintiff, I thought, should recover the difference between the price which the defendants were to pay, (I suppose 8 cents, the price of what he had before received,) and what the bread would have brought in market, allowing a reasonable time. Had the plaintiff sold the bread, at whatever loss, he might have recovered the difference in price. If, indeed, the large quantity ordered by the defendants had produced a glut in the market, which prevented the sale of it, then the plaintiff might recover perhaps the entire value. Of this there did not seem to be any proof. The jury found for the plaintiff a sum nearly equal to the full price of the bread."

To this it may be proper to add the testimony of Fourgeaud, also a baker, whom the defendants had deceived in the same way, that he had sent part of his bread to Key West, and lost 30 *per cent.* on it; but had lost nothing on the rest; but that an auction sale in November or October would not bring more than 2 or 3 cents.

Verdict for the plaintiff, \$2029 36.

The defendants appealed, and moved for a new trial, because the damages far exceeded the loss that would have accrued if the plaintiff had sold within a reasonable time.*

* This case had been before the Appeal Court at a previous term, (Charleston, February, 1839,) on substantially the same evidence; (only that nothing appeared on the first trial of "previous transactions remaining unsettled" between the parties;) and the court, *per* EVANS, J. delivered the following opinion on the points then put in issue.

"This was an action of *assumpsit*. There were various counts in the declaration for work and labor, money paid, and for goods sold and delivered. The whole question arose out of the following account:

Messrs. Hilliard & Wade,

			To R. S. MILLAR.	
1838, April 3d,	Barrel,	180 lbs. 24 to 1,		\$7 50
8	keg of Butter Crackers,	47, 10,		4 70
9	bbl. " "	97, 10,		9 70
10	" " "	94, 10,		9 40
20	417 bbl. Pilot Bread,	\$33 301 lbs. 8,		2664 08
				<hr/>
				\$2695 38
				<hr/>

"The controversy related to the last item of the account. The only count in the declaration on which it could be recovered was the last, which was for goods sold and delivered. It appeared from the evidence, that on the 10th February, the defendants directed the plaintiff to bake a supply of bread for them. The general direction was to go on and bake until they directed him to quit. About the 20th, the plaintiff was notified that the defendants declined to take the bread, and about that time, the plaintiff tendered the bread to defendants, and they refused to take it. The witness said he tendered it, but I do not understand he did more than to inform the defendants the plaintiff was ready to deliver it. The bread was at the time in Millar's ware-house, where it has remained ever since. It has never been out of his possession. On the trial, the plaintiff produced his book of accounts, wherein he had charged the defendants with the bread, but admitted he had never delivered it. The jury found a verdict for the whole amount of the plaintiff's account, deducting a small discount. There was a

Curia, per EARLE, J. The present motion is to set aside this verdict and grant a new trial, because the damages are excessive in amount, and arbitrary, as not being formed on any just principle or standard, and not sustained by any sufficient proof. The power of this court to grant a new trial in such

great deal of testimony given at the trial, but the foregoing statement presents so much of the case as is necessary to the understanding of the points to be decided. These are, 1st. was the book of entries properly admitted. 2d. could the plaintiffs, on the facts stated, recover the full price of the bread, on the count in his declaration for goods sold and delivered.

"The books of a tradesman, mechanic, or shop keeper, are in general received as evidence of the sale and delivery of goods: but this must be understood in reference to those cases where the contract has been fully executed by the seller. If the action be for non-performance of the contract, then he must recover by proving his contract, and the breach by defendant. In such case, the matter in controversy is not the subject of book account: the plaintiff must make out his case by witnesses. The Judge did allow the book to be produced, and the plaintiff to prove the entries; but upon his saying the bread had not been delivered, the jury were instructed that the book proved nothing, and that they must look to the other evidence to establish the plaintiff's right to recover. I do not therefore think there is any thing in this which would authorize us to grant a new trial.

"On the 2d ground, I would remark that, in order to maintain *indebitatus assumpsit*, the plaintiff should prove that he at least has performed his part of the contract, or done that which is equivalent; whilst a contract is incomplete, he must sue on the special contract and recover for a breach. If A. sells to B. a horse or a negro, and deliver him, *indebitatus assumpsit* will lie for the price. But if B. refuse to receive the horse, the action must be to recover damages for the non-performance. He cannot sue for the price without delivery, or something which is equivalent to delivery. By tender, I understand some such offer as puts it in the power of the other party to take immediate possession of the thing tendered. If there be a tender of money, the money must in general be produced; and the money must be paid into Court, so that the other party may take possession of it. If A. sells to B a tract of land, to enable him to recover the price as on a contract executed, he must execute and deliver the title, or must have produced and offered it to the defendant, and must follow this up by depositing the title in Court, so that the defendant may take it out. In the case of *Smith vs. Chance*, (2 B. & A. 753,) HOLBORN, J. said, "A party cannot maintain an action for the price of goods sold and delivered, until he has either delivered them, or done something equivalent to delivery, as for instance, if he has put it in the vendor's power to take away the goods himself." If A. sells a horse to B., and he goes to B. and tells him he is ready to deliver him, or even says I tender you the horse, but the horse is in the seller's stable, and not present, so as to enable the vendor to take possession; this would not operate as a

cases is unquestionable, and has been occasionally, though rarely, exercised. Where there has been no misdirection in point of law, such a power should be exercised with great caution, and only in very flagrant cases, else in the process of time, the judgment and opinion of this court will come to overrule and supercede the judgement and opinion of the jury, on questions of fact, of which they are the constitutional and proper judges. As a general rule, in cases of tort, excess of damages is never a ground for setting aside a verdict; though a case now and then has occurred, where the damages have been so extravagant as to produce a conviction of undue partiality or prejudice. In actions on contracts, there is, in all cases, a just and proper standard by which the damages should be assessed; and when it is obvious that the jury have

transmission of the title to the purchaser, so as to enable him to maintain trover against the vendor; or if the seller had produced the horse, but, on the vendor's refusing to accept him, had carried him home and put him back into his stable, and there kept him; this would not be delivery, or its equivalent. To make a tender effectual, it seems to me, the seller must, in general, abandon the possession. If he retains possession, the title to the property is not changed; and the vendor's remedy is for damages for the non-performance of the contract. The error has arisen from confounding an offer to perform, which gives the vendor a right of action for non-performance, with such a tender as is equivalent to performance, which vests the property in the vendee, and gives the vendor an action for the stipulated price. In this case it is not pretended, that the plaintiff did more than to inform the defendants the bread was ready to be delivered to them. It was then, and is now, in his possession, and at no period could Hilliard & Wade have possessed themselves of it without his consent. As the contract was never executed, he can recover damages for the non-performance only, which the witness thought was about 30 per cent. It is not intended to intimate any opinion as to the amount he ought to recover. If the contract be proved to the satisfaction of the jury, they ought to compensate the plaintiff to the full amount of the injury he has sustained. The extent of this injury is uncertain. It may sometimes be equal to the whole value of the property; but in this case the plaintiff might have made it much less by shipping to Key West, as one of the witnesses did; or he might have reduced it to certainty by selling at auction, as was done in the cases reported in 1 M'Cord, 298, and 5 Johnson, 405. Upon the whole, I am of opinion, the plaintiff cannot recover, on the counts in his declaration and the evidence given at the trial, the full price of the bread. The motion for a new trial is therefore granted; and the plaintiff has leave to amend his declaration, by adding a count or counts, on the special contract."

mistaken, or disregarded that standard, and have given damages for an injury which has not been sustained, or have given compensation in damages extravagantly beyond the injury proved, there is then fair ground for the interposition of the Court. Is the case before us one of that description ?

In the first place, there was no misconduct on the part of the circuit court. The jury, fully and properly instructed, (for there is no exception taken on that ground,) have found an amount of damages beyond what the court expected. It is clear that they did not mistake the standard of damages laid down by the court; is it clear that they have wholly disregarded it, or that they have done more than a just latitude of discretion would allow them, in exercising their own judgment, as to the price or value of the bread in market, at the time the defendants finally refused to take it ?

There is no doubt, in fact, that the plaintiff has sustained damages beyond the verdict; that he has sustained them without actual fault on his part, and in consequence of the defendant's breach of their agreement; a breach accompanied with striking circumstances of *mala fides*. Now, in *assumpsit*, it is true, the plaintiff cannot recover for ideal, nor speculative, nor in general, perhaps, for consequential damages. But he may recover, and ought to recover, the actual damages he did sustain, if they were the natural or probable result of the defendants's breach. The whole of the bread ordered by the defendants has been lost to the plaintiff; and it is objected that they ought not to pay for it, because the plaintiff ought to have sold it; that he might have sold it at an inconsiderable loss, and that they should not suffer for his default, or for his ignorance of his rights. This is true, and we should have been better satisfied if the jury had estimated the bread at a higher price than they have done. But on that point there was conflicting testimony. Mr. Forgeaud, another baker, whom the defendants had deceived with the same bad faith, shipped and sold instantly, on their first

refusal. They said to the plaintiff, we may perhaps take the bread at the end of the month. He waited, and they again refused. But warm weather came on, and the bread being in barrels, soon became injured. If the plaintiff had shipped to Key West when Forgeaud did, the market there might have been glutted and neither could have sold. Had he offered 417 bbls. for sale in Charleston, in the spring, at auction, the evidence was, that it would have brought only a very reduced price, and this was in consequence of the large quantity ordered by the defendants, and also in consequence of a ship arriving from abroad with the same article. With full and specific instructions that the plaintiff was entitled to recover the difference between the price agreed to be paid and that which the article would have brought in market, allowing a reasonable time to make the sale, the jury have estimated that the bread would have probably brought at auction about two cents per pound, and have found, for the plaintiff, the balance. A majority of the court, upon full and mature consideration, do not perceive in this verdict, that violation of truth and justice, or that departure from the standard laid down to them, or that disregard of the evidence, which would lead to the belief that it was the result of undue partiality, or prejudice, or of any other improper bias.

There is one feature of this case, which appeared in the last trial, that presents it in a new aspect. The defendants were receiving bread from plaintiff at the time this was ordered, under a previous order for an indefinite quantity. That contract was still open, and the order not filled. Pending this, the defendants say to the plaintiff, "go on and bake as fast as possible, until you are ordered to stop." They gave no order to stop, but afterwards received bread and paid for it. I think on that proof there is great reason to consider the whole as one continuing contract, and that a delivery of part was in law a sufficient delivery of the whole to make the defendants liable. Whatever weight there may be in this

view of the case, it is now of no other importance than to reconcile me the more to the result of the action, which we feel bound to render final.

Motion dismissed; GANTT, EVANS and O'NEALL, JJ. concurring.

Hunt for the motion.

Henry B. Toomer vs. Thomas O. Dawson.

*Opinion of EARLE, J.** In addition to the views presented by Mr. Justice BUTLER, in which I concur, it may be added as another reason for sustaining the judgment below, that the 6th section of the Vendue Act requires auctioneers to keep a book in which shall be fairly written and entered all vessels, lands, houses, slaves, or other articles "by them sold or disposed of, either at public outcry or by private sale." If any entry so made of a sale at auction, would be binding, which I think has never been questioned, there is no good reason why an entry in compliance with the provisions of the Act, of a sale by private agreement, negotiated through the agency of the auctioneer, and made in the presence of the parties, should not be considered equally binding. The terms were agreed on in the presence of the auctioneer, and he entered the sale at the time, and in the presence of the defendant, which I consider a sufficient authority under the Act, and as binding on the defendant.

* See, *supra*, p. 68, the case in which this opinion was given, which the Reporter, unfortunately, had no intimation of till it was too late to put it in its proper place.

AT COLUMBIA, MAY, 1840.

JUDGES PRESENT.

Hon. R. GANTT,
Hon. J. S. RICHARDSON,
Hon. J. J. EVANS,
Hon. J. B. O'NEALL,
Hon. B. J. EARLE,
Hon. A. P. BUTLER.

The State vs. James R. Smith.

Shaving the mane and cropping the hair from the tail of a mare in the owner's stable, did not constitute the offence of "disfiguring" created by A. A. 1789.

Quere, whether an indictment in the general terms of the A. A. 1789, is sufficient without setting out the manner of disfiguring.

Before O'NEALL, J. at Chesterville, Fall Term, 1839.

The defendant was indicted under the 3rd section of A. A. 1789, (P. L. 486; 5 Stat. So. Ca. 139,) for disfiguring the prosecutor's mare. The words of the Act are, "If any person or persons shall be lawfully convicted of wilfully and knowingly marking, branding or disfiguring of any horse, mare, &c." The indictment did not set out the manner in which the disfiguring was accomplished, but followed the

words of the Act, which the presiding Judge thought sufficient. - The mare's mane had been shaved, and the hair of her tail cropped off close to the bone. Verdict, *guilty*.

The defendant appealed, moving for a new trial, on the ground of certain exceptions to the evidence, which were not considered by the Court,—and in arrest of judgment,

Because the indictment did not set out the manner of disfiguring; and,

Because the case proved, did not amount to an indictable offence.

Curia, per EARLE, J. The second ground taken, in arrest of judgment, presents the only question we shall consider; that is, whether the act proved against the defendant was indictable under the A. A. 1789, (P. L. 486; 5 Stat. So. Ca. 139.)

By the third section of that Act, a person convicted of wilfully and knowingly marking, branding, or disfiguring any horse, mare, &c. is subjected to a penalty of £20, and, on non-payment, to be publicly whipped. In construing the Act, it is advisable to refer to its title and to its other provisions, as also to the former laws upon the same subject. The title is, "An Act to prevent the stealing of horses, asses and mules; and for the more effectual prevention of stealing black or neat cattle, sheep, goats, or hogs; and for the punishment of those who shall unlawfully *mark, brand, or kill* the same." The second section provides a punishment for *cattle stealing*, and the third follows, in immediate connection, imposing the same punishment for marking, branding, or disfiguring either horses or cattle, and a severer penalty in money than is prescribed for stealing sheep, goats, or hogs. The main purpose of the Act was, clearly, to provide adequate punishment for certain offences, which were larcenies at common law, but which had been otherwise punished by former Acts. It is material to observe, that the word "disfiguring" is not used in the title of the Act; but the words are, "mark,

brand, or kill ;” and the same punishment is prescribed for those who mark, brand, or disfigure either cattle, sheep, goats or hogs, as for those who steal them. The first clause of the sixth section, which relates to these smaller animals, has the words “marking, branding, or disfiguring,” and the clause which provides for the second offence, has the words “killed, branded, or disfigured” in the same connection. The sixth section forbids a slave to brand or mark any of the domestic animals, except in the presence of a white person and by his direction. If we consider the habit of the country in regard to these animals—that they have always been permitted to roam at large in the fields and forests, the right of property guarded only by such marks and brands as would identify them, and denote the owner—and then view, in connection, the provisions of the Act, we shall have a sufficient clue to the intentions of the Legislature. These animals were particularly exposed to the depredations of the idle and dishonest ranger of the woods, who might, with great facility, either kill for immediate use, such as were suitable, or endanger the owner’s right of property, by “marking, branding, or disfiguring;”—by marking and branding such as were unmarked and without brand ; or by disfiguring such as were marked and branded, either by obliterating former marks and brands, or otherwise disguising the appearance and figure in such a way as to prevent the identity from being ascertained. Such was the nature of the offence which the Legislature intended to provide for and punish. Such had been the purport of former Acts on the subject. The first Act was passed in 1743, and was entitled “An Act to prevent stealing of horses and neat cattle, and for the more effectual discovery and punishment of such persons as shall unlawfully brand, mark or kill the same;” and the preamble recites the “great evils of stealing horses and neat cattle, and of unlawfully marking, branding, or killing the same.” In 1762 and 1768, an Act was passed, with the same title and similar provisions, which

was again revived in 1784, all of them having been limited in their duration. In the Acts of 1762 and 1768, the preamble is the same, and recites "the stealing of horses, and the stealing and unlawfully branding, marking and killing of neat cattle." Yet, in none of them is there any provision against stealing neat cattle, *eo nomine*: the offence is made to consist in "wilfully killing, marking, branding, or disfiguring any horse, mare, &c. or neat cattle, the property of any other person."

From this reference to former enactments, we think it clear enough that the Legislature looked to the preservation of the right of property, against thieves, or open trespassers, by guarding those brands and marks which were usually adopted, from being obliterated or disguised, and preventing the animal from being otherwise disfigured so as to mislead the owner.

The act charged against the defendant was not of that description. The change in the appearance of the mare was temporary; she was neither branded nor marked, and the cutting of the mane and tail could not have been intended to prevent her being identified, as she remained in the owner's stable. It can only be regarded as a mischievous trespass, and we cannot bring ourselves to view the perpetrator as having incurred the same penalty as if he had stolen his neighbour's cow, or altered the brand of his horse. If to cut off the mane of a horse is to disfigure, the cutting off a goat's beard would be the same; and, without intending to treat the subject with levity, could we consider the cutting off the beard of a ram goat, by a mischievous boy, as equal in guilt, and subject to the same penalty, as stealing him? We do not say that the penalty may not be incurred by disfiguring a horse in his owner's stable, or that the act must be done *animo furandi*. We will leave the cases to be adjudged as they arise; but are of opinion that the defendant has not committed the offence described in the Act. As the manner of disfiguring is not set forth in the indictment, we can only grant

a new trial to enable the defendant to avail himself of this judgment. And it is so ordered.

GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurred.

O'NEALL, J. I think there is nothing in the objection to the indictment. The case of *The State vs. Cantrell*, (2 Hill R. 389,) was for maliciously killing a horse in the night time, which subjects the party to a heavy penalty; the indictment there followed the words of the Act, and did not set out the manner of the killing: it was held to be sufficient. If that case be law, I am at a loss to conceive why that rule should not govern this. Both indictments are for statutory offences; the former of a much more heinous character than the latter.

If the manner of maliciously killing a horse in the night time need not be set out, it surely cannot be necessary to state the manner in which he was disfigured. But if *our own case* is not a sufficient guide for us, surely *English precedents* will be enough to satisfy the most fastidious. Refer to the forms of indictment under the *Black Act*, and they will be found to be as general as the forms now before us.

The most serious objection is that which makes the question whether the offence made out by the proof be an indictable one. The words of the Act, "wilfully and knowingly *marking, branding or disfiguring*," describe the offences prohibited. Marking, branding and disfiguring are three offences which may be committed under the Act. To make out the offence of disfiguring, it cannot be necessary to shew facts that would make out the offences of marking or branding. An alteration of natural marks whereby a horse is known, is, unquestionably, disfiguring. Why? Because his natural appearance is changed. Cut off his tail; and, if it be a part of the flesh, or bone, it is admitted that it would be a disfiguring. When the hair is shaved off, is it not just as much a disfiguring of the horse, and often more, than cutting off his tail? To me it seems to be so. The object of the Act was not only to prevent the disguising of horses, cattle,

&c. "by altering the flesh marks so as to prevent the owners from knowing them;" but it was, also, to prevent malicious mischief. The disposition to do that which may vex and harrass another, without any benefit to the person doing the act, is, beyond all doubt, as much to be curbed and restrained by law, as that which aims at higher results of crime. This case is an apt illustration of such a law. No one can doubt that the defendant's act was one of mere wantonness and malice. Is it to go unpunished, under a law which covers it in words, and where all the reasons of the enactment would lead us to say that it may be within the intention? For one, I cannot answer in the affirmative. Let the defendant, and all others in a like way offending, be punished; and the security of the citizen in the enjoyment of his property, will be established by law, and not only by his own right arm, to which he might, otherwise, have to appeal.

The only serious objection to this construction of the Act, is the decision of the Court of Appeals in the case of *Gage vs. Shelton*. But that decision, rightly understood, would not, I think, stand in our way. That was an action of slander: the words, in one of the counts, were, "last night my horse was docked," &c. It was held that these words did not impute the offence of disfiguring; "for," said Mr. Justice JOHNSON, "there is nothing in the mere cutting off the hair of a horse's tail, that is, in itself, so calculated to disfigure that the owner would not know him again; nor was there any thing, in the manner of speaking the words, calculated to convey the idea that the defendant imputed that intention to the plaintiff." To dock a horse is any thing else than disfiguring him. It is done by some horse jockies to improve his appearance. The only meaning of the Court, in the case referred to, is, that such words do not necessarily import the offence of disfiguring. But those words are very different from the charge of shaving off the mane and the hair from the tail. This constitutes a charge of altering the animal as seriously as if the ears or the tail had been cut off. I am,

therefore, satisfied that that case does not stand in our way, and that the words of the Act cover the offence proved. The grounds for new trial require no comment. The report sufficiently explains the propriety of the evidence recorded, and of the verdict found upon it.

Thompson & Eaves for the motion.

The State vs. John Wilson.

Any cruel beating of a slave is punishable under the negro Act of 1740, sec. 45, whether of the same grade of cruelty with the instances specified in the Act or not.

Before GANTT, J. at Columbia, Spring Term, 1840.

Indictment for cruelly beating a slave, under A. A. 1740, (P. L. 173,) sec. 45, viz :

“And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin, switch or small stick, or by putting irons on, or confining, or imprisoning such slave; every such person shall, for every such offence, forfeit the sum of one hundred pounds, current money.”

The circumstances of the case are detailed in the opinion of the Appeal Court.

The jury were instructed that the words “any other cruel punishment,” were not controuled in their sense by the previously enumerated instances; and that any unauthorized cru-

elty, whether or not of the same grade with those, was indictable under this clause of the Act. Verdict, *guilty*.

The defendant appealed, and moved for a new trial on the ground of error in the Judge's charge.

Curia, per GANTT, J. This was an indictment under the negro Act of 1740, (P. L. 173,) sec. 45, for cruelly beating a slave. The clause in question reads thus; "If any person shall, on a sudden heat or passion, or by undue correction, kill his own slave, or the slave of any other person, he shall forfeit the sum of three hundred and fifty pounds, current money. And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb, or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin, switch, or small stick, or by putting irons on, or confining, or imprisoning such slave; every such person shall, for every such offence, forfeit the sum of one hundred pounds, current money."

The offence charged, and fully proved, in this case, was that the defendant did beat on the head, with a pistol, a negro man slave, named *Stuart*, the property of Loomis & Davis. It did not appear that the negro had in any manner conducted himself amiss, or had said or done any thing to justify the defendant's conduct. Wilson was in a state of intoxication, and meeting with *Stuart*, a mulattó man, conceived him to be an Indian, immediately struck him several severe blows on the head with a pistol, thereby disabling the slave considerably, and rendering it necessary to send for a physician. After being confined at the place where he was beaten for some days, he had to be sent home to his master.

The Act of Assembly designates the horse-whip, cow-skin, switch, or small stick, as instruments proper to be used for the correction of slaves. To strike, therefore, with a pistol over the head, and with violence, an unoffending and unresisting slave, and inflicting serious wounds on the head, there-

by disabling the slave for a time to perform service for his master, and subjecting the master to the expense of a physician's attendance, constituted such a beating as, in the opinion of the presiding judge was punishable by indictment, pursuant to the obvious intendment and meaning of the Act of Assembly. The jury were so instructed by the presiding judge, and found the defendant guilty. The case is now brought up on the following grounds.

"That the presiding judge charged the jury that the punishment inflicted on the slave need not be of the same grade of cruelty with those particularized in the statute."

The court are unanimous that the presiding judge did not err in the construction given to the clause of the Act under which the defendant was indicted.

To beat with a pistol over the head, is not with such an instrument as is contemplated by the Act, and in this case, may emphatically be denominated a cruel punishment, and such as subjected the defendant to the penalty of the law.

Motion dismissed; the whole Court concurring.

Cheves for the motion; *Myers*, for the *Solicitor*, contra.

Thomas Sanders vs. R. J. Gage, Executor of John Rogers.

Plaintiff in sum. pro., having sustained his whole claim *prima facie*, defendant's testimony reduced it to \$15, and the judge decreed for the plaintiff to that amount. Decree reversed and non-suit ordered.

Before RICHARDSON, J. at Union, Spring Term, 1840.

SUM. PRO. on several distinct items, in all \$66 70. Good *prima facie* evidence was given of nearly the whole amount, but was rebutted by the defendant, so as to reduce the plain-

tiff's claim to \$15 18 $\frac{3}{4}$ and interest. As the plaintiff did not appear to have added merely fictitious items for the purpose of swelling his account to the *sum. pro.* jurisdiction, the Court decreed for the plaintiff the amount found due, as above.

The defendant appealed, on the ground that the Court had no jurisdiction over a cause of action less than \$20, and ought to have ordered a non-suit.

Curia, per EARLE, J. The Act of 1824, (6 Stat. So. Ca., 239,) makes the jurisdiction of justices of the peace exclusive, "in matters of contract, to the amount of twenty dollars," with the right of appeal. Upon the construction of that Act, it would seem strange that there should be a difference of opinion, or that there should be any doubt that the jurisdiction depends on the sum proved, and not upon the amount claimed. If it were otherwise, the plaintiff might easily evade the Act, by inserting a plausible claim in his process, upon which some evidence might be offered, although he might know that it would be rebutted. Every plaintiff should be prepared to furnish satisfactory proof of the debt due to him, or of the value of that which he claims; and, if it be at all doubtful, let him, for safety, restrict his demand to twenty dollars, as was done in *Goldthwaite vs. Dent*, (3 M'C. R. 296,) where a justice, upon a *quantum meruit* for services, gave judgment for twenty dollars; the proof being that the services were worth from fifteen to fifty dollars. The Court said, "it does not follow, because the plaintiff may have charged more, that he may not charge and recover less." If the construction contended for were adopted, it would be easy for the parties, plaintiff and defendant, by agreement, to secure the jurisdiction of the Court, and evade the wholesome provisions of the Act, which were intended to confine such small and mean causes within the inferior jurisdiction.

The precise question has been several times decided, and cannot be considered as any longer open for argument. *Da-*

vidson vs. Setzler, (3 MSS. D. 669,) decided in 1827, was like the case now before us. It was a summary process, tried before Mr. Justice GANTT, at Newberry. The plaintiff's demand was an account of \$21 50, for goods sold and delivered. She furnished proof to the amount of \$16 81, but failed, as to the balance of the amount, to produce legal and competent evidence. A motion for a non-suit was made, which his Honor overruled, on the ground that the plaintiff's real cause of action was within the jurisdiction of the court, and it was her misfortune, not her fault, that she failed to establish two items, under the usage and practice of the court. He therefore gave the plaintiff a decree for the amount proved, and leave to discontinue as to the items not proved. The motion for non-suit was renewed in the court of appeals, and was granted. The court said, "the Act of 1824 has made the jurisdiction of magistrates exclusive, to the amount of twenty dollars, and therefore the court has no longer any authority to act in such cases. If the plaintiff fail to prove his account, and cannot shew cause for postponement, let him submit to a non-suit and commence his action again."

In *Harris vs. Overby*, (4 MSS. D. 491,) tried in 1829, plaintiff brought *assumpsit* for one hundred dollars for services rendered as a physician to the defendant's daughter, and proved the defendant's promise to pay. This was rebutted by other evidence, that the plaintiff undertook to make an effectual cure, or to charge only five dollars; that the patient was not cured, and that the defendant's promise to pay 100 dollars was made under a mistaken belief of her being cured. The Judge charged that the plaintiff, on that proof, could only recover five dollars. But the jury found for the defendant, and the plaintiff appealed. The Court held that the amount proved "was exclusively within a magistrate's jurisdiction; and, if a plaintiff may, by superadding a fictitious cause of action to the real demand, transfer the cause to the circuit court, and recover a judgment, the jurisdiction of magistrates will be annihilated, in violation of the law, and

to the great delay of public justice." I have referred thus minutely to these cases, because they are not reported, and may not otherwise become known to the bar. They were followed by *Ferguson vs. Teemster*, (1 Bail. 516,) where, in covenant by landlord against tenant for not making repairs to demised premises, the plaintiff proved the value of the repairs to be 15 dollars, and was non-suited. It was held, that the demand was exclusively within the jurisdiction of a justice of the peace.

Next followed the case of *Caldwell vs. Garmany*, (4 MSS. D. 442,) decided in December, 1836, which was a *sum. pro.* on the warranty of soundness of a horse; and Mr. Justice BUTLER non-suited the plaintiff, on proof that his damage did not exceed twenty dollars, after hearing witnesses on both sides.

It is supposed that the case of *Nance vs. Palmer*, (2 Bail. 88,) is in conflict with the decisions referred to, and that we are overruling that case. Such is not the opinion of a majority of the court. In that case, a motion for non-suit was made in the circuit court, after a verdict for the plaintiff, upon the evidence. It was refused, and the decision was affirmed by the court of appeals, on the ground that, according to settled rules of practice and pleading, the plaintiff could not be non-suited after he had a verdict. Mr. Justice JOHNSON, in delivering the judgment of the court, alludes to the practice of the courts, in cases where the plaintiff has deceitfully and without any pretence, superadded a fictitious cause of action to a meritorious one, in order to secure a particular jurisdiction, by enlarging the amount; and cites the case of *The Cambridge Association vs. Nichols*, (1 T. Const. R. 121.) That was upon the construction of the Act of 1769, (P. L. 270,) creating the summary jurisdiction, which authorized the courts to determine in a summary way "all causes cognizable in the said courts, for any sum not exceeding £20 sterling." The jurisdiction there, is made to depend upon the cause of action, the sum or amount of the demand claim-

ed; and the decision in 1 Tread. is not at variance with the view we take of the Act of 1824. Even there, and in cases of like kind, if the demand of the plaintiff, sued for in the general jurisdiction, were reduced by proof of actual payment, to a sum within the summary jurisdiction, the result would be to deprive the plaintiff of more than summary process costs.

In the United States Courts, where the jurisdiction depends upon the amount or sum, the Acts of Congress use the words "matter in dispute." There, the proceedings are stayed at any stage, when it is made to appear that the case is without the jurisdiction. Such too is the practice of the English Courts; not on the mere suggestion of the defendant, that the sum or debt is too small; but, according to later authorities, always on the affidavit of the defendant, if not denied by the plaintiff; or upon any admission or acknowledgement of the plaintiff, that such is the fact. (2 Black. Rep. 754; 4 T. R. 495; 5 T. R. 64.) Under the former practice, when proceedings were not stayed upon mere affidavit, it was said, in (2 Ld. Raym. 1304,) "it ought to appear upon the trial, that the cause of action was under forty shillings." From which I infer, if it had so appeared on trial, that the plaintiff could not have had judgment.

If, in *Nance vs. Palmer*, the motion had been in arrest of judgment, I do not perceive how it could have been refused, without overruling the previous cases of *Davidson vs. Setzler*, *Harris vs. Overby*, and *Ferguson vs. Feemster*. But as the motion was for a non-suit, after the defendant had gone to a jury on the merits, and the plaintiff had a verdict, on rules of practice, it was properly refused. It is urged that the plaintiff having offered evidence, on that part of his demand which is rejected, enough to put the defendant to proof, makes a different case to which those cited do not apply. But *Harris vs. Overby* was precisely the same; and in *Davidson vs. Fetzler*, the presiding judge was satisfied that

the rejected items were not fictitious and pretended, but were just. A plaintiff may bring an action by *sum. pro.* with a certainty of recovering over 20 dollars ; but, (his demand consisting of several particulars,) a witness to prove some of them dies before trial, or removes, or is accidentally absent, so that he can only prove a demand under 20 dollars. He would stand on stronger grounds of equity and reason, than a plaintiff who includes demands which the defendant proves to be unjust. Why should the latter recover any part of his demand, and the former be non-suited for want of jurisdiction ?

The construction given to the Act of 1824, is congenial to the spirit of former legislation on the same subject ; for the Act of 1747, (P. L. 213,) which created the jurisdiction of justices of the peace in civil actions, declared, that all suits, for the recovery of debts, demands, or damages, to the value of £20, or under, whereby it should appear that the plaintiff has been damnified to no higher value, should be triable only before a justice, and in no other court whatever ; making the jurisdiction to depend on the amount, or sum proved on the trial.

Without overturning *Nance vs. Palmer*, or denying its authority, we think that the plaintiff in the case before us, having established a demand under twenty dollars, was not entitled to a decree. The decree which was pronounced in his favour is set aside, and the motion for non-suit is granted.

EVANS and BUTLER, JJ. concurred.

RICHARDSON, J. *dissenting.* In this case the plaintiff gave good evidence of his demand to the amount of sixty-one dollars ; but the defendant then gave counter evidence that reduced the debt to fifteen dollars and interest. The plaintiff could not be non-suited upon the defendant's evidence ; so the judge decreed for the \$15 and interest.

The case of *Nance vs. Palmer*, decided by the court of appeals, (2 Bailey R. 98,) was in the same situation ; but the *sum. pro.* was referred to the decision of a jury, who found

for the plaintiff \$14. Upon this verdict, judgment was given for the amount of the verdict; and the court of appeals supported the judgment as within the proper jurisdiction of the court. Now, if in that case the presiding judge had given a decree for \$14, could that have taken the case out of the jurisdiction? Whether upon verdict or decree, it is the *Judge* that gives the judgment within his jurisdiction. The jury were no more than the agents of the court, in order to fix the amount of the defendant's indebtedness; which being so fixed, the judge gives judgment to the plaintiff. The verdict cannot make jurisdiction. If the case be without the jurisdiction, the verdict is a legal nullity upon which no judgment can be awarded by the judge. Even the consent of the litigants, an award, or a confession of judgment cannot give jurisdiction. The case would be out of court and void *per se*. But, in all such cases, the want of jurisdiction must appear from the case itself, as an inference from its facts.

Apply the case of *Nance vs. Palmer*, to the one before us. If the judge had referred *Sanders vs. Gage* to the jury, and they had found \$15 due, the verdict would have stood, and the judgment of the court would have been right. But the judge, without requiring the aid of the jury, gives judgment for that amount, and then, according to the argument, the amount is out of his jurisdiction, and the judgment void. It would follow, then, that the amount of indebtedness being ascertained by a jury, may, in such case, give jurisdiction; but the same truth, when ascertained by the judge, or even by the confession of the parties, has no such effect. The inconsistency cannot be reconciled; and, if *Nance vs. Palmer* be law, the decree in *Sanders vs. Gage* was right. And I now propose to prove it a sound decision.

The rationale of *Nance vs. Palmer* is that, if the creditor has *prima facie* proof that the debt amounts to more than \$20, he may and must demand it in the circuit court. For, if he sue before a magistrate, his own evidence must put his case

out of court, and he would be without remedy. The counter evidence of the debtor, which may, or may not exist, and is unknown to the plaintiff, cannot therefore affect the jurisdiction, which necessarily depends on the case as proved by the plaintiff. Take, for illustration, the counter case to the one before us. A. sues B. before a magistrate, for \$15 and proves that amount: A. is in court. B. then adduces evidence to prove the debt \$50. Can that take the case out of the jurisdiction, and take it out of court? If it can, A. can get judgment no where; for, upon his own evidence, he must be non-suited in the circuit court; and his case is without a remedy. The same would be the case where A. sued B. for \$80 in a *sum. pro.* and proved the amount, if B. should then prove the amount \$90. A. would be non-suited upon B's. evidence; whereas the legal principle is that, if the plaintiff be properly in court by his own testimony, he can be put out only upon the merits; that is, upon the trial of the issue made up. And this is the proper principle in *Nance vs. Palmer*. And the same principle illustrates well that the jurisdiction of the case now before the court depended upon the plaintiff's evidence.

If the summary jurisdiction of the court were to depend upon the final amount of the indebtedness of the defendant, as apparent from his own evidence, then it would follow that, if A. has two notes of B., each for fifty dollars, he could not sue B. on one, or each of the notes in the summary jurisdiction. For, upon its appearing, on the part of the defendant, that his whole demand was an hundred dollars, A. would be non-suited. This would also be the case where the defendant reduces the plaintiff's claim, by discount, to \$20. But it is settled law, that, in either of these cases, the plaintiff's claim is still within the jurisdiction. And, although it is sometimes said that the latter case is kept within the jurisdiction because reduced by discount, yet the true principle of all those adjudications, like that of *Nance vs. Palmer*, de-

pend upon the plaintiff's case, as shewn on his part. If he acted deceitfully, as by joining pretended causes of action, as said in *Nance vs. Palmer*, he could not succeed. Or, if he denied receipts given, these would form intrinsic and inseparable parts of his own case, or would constitute exceptions to the rule.

Let us now turn to the MSS. case of *Caldwell vs. Garmany*. I grant, according to that case, the claim in *Sanders vs. Gage* was out of the jurisdiction, and Sanders ought to have been non-suited upon the defendant's evidence. We have then to decide between that case and *Nance vs. Palmer*. But the case of *Nance vs. Palmer* has been practised upon exclusively. It makes the plaintiff's case, as proved by him, the test of the jurisdiction. On the other hand, if the jurisdiction is made to depend upon the defendant's evidence, no skill or learning can assure a creditor where he may bring his action.

But if such a principle is to prevail, then assuredly the defendant must first plead specially to the jurisdiction, pointing out the proper form, and why the plaintiff's case is not the subject of the jurisdiction, within which it has been brought with apparent right and reason. All such pleas to the jurisdiction require, for justice and safety to the plaintiff, (Cowp. 172 ; 6 East. 583,) that the true jurisdiction be pointed out. Without such a plea, how are we to give judgment in such a case? We cannot decree *nil capiat*, nor for the defendant ; because that would estop the plaintiff's recovery in any court. We cannot non-suit the plaintiff, because he has sustained his claim to the extent of sixty-one dollars ; and we cannot arrest the judgment, because there is no fault in the record.

Is it not then plain that the plaintiff must have his judgment, unless the want of jurisdiction appears by his own shewing, or is spread upon the record by a plea that designates the more proper jurisdiction to which he may be referred for justice? And in summary jurisdiction, all special

defences must be pleaded. (*Bailey vs. Wilson*, 2 Bail. R. 15.) And I am supporting a decision made upon the record and evidence as presented. Thus, then, the case before us is referred back to the plain principle of *Nance vs. Palmer*; that is, if the *allegata* and *probata* of the plaintiff come within the jurisdiction, the plaintiff cannot be put out of court, but upon the merits of his case, because a legal cause of action is first exhibited and then proved.

GANTT, J. I concur in this opinion.

Goodwyn, Harrington & Co. vs. Robert Douglas.

A coat, ordered by a customer resident abroad, without instructions as to the mode of conveyance, was sent through the stage coach by the tailor, who paid the freight. The coat being lost in transitu, the vendor had his action against the carrier.

"Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue, and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the proposition is true, and he will be regarded as having had a constructive delivery made to him from the time the goods are put into the custody of the master or carrier."—*Butler, J.*

"I do not see why the defendant should object to the plaintiff's action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him."—*Id.*

Before BUTLER, J. at Edgefield, Spring Term, 1840.

SUM. PRO. for the price of a coat lost by the defendant, the owner of a stage coach running from Edgefield to Abbeville. The plaintiffs were merchant tailors, and had made a coat

for one of their customers residing at Abbeville. When the coat was spoken for, the plaintiffs said they would send it by the stage. It was delivered to the driver by the consent of the defendant, and was never delivered to the customer; upon which the plaintiffs brought this action against the defendant as a common carrier. It appears, from the opinion of his Honor, as below, that the freight was paid by the plaintiffs.

A motion was made for a non-suit, on the ground that the customer, the vendee and consignee, should have brought the action. Motion overruled, and decree for the plaintiff.

The defendant appealed, and moved that the decree of the court should be reversed and a non-suit ordered.

Curia, per BUTLER, J. In sustaining the decision below, I do not think it necessary to refer to all the authorities relied on in argument, for the support of this motion. I do not controvert the general doctrine, that, when goods are delivered to a common carrier, whether to a master of a vessel or a wagoner, on account, or at the instance of a consignee or vendee, the property shall, *prima facie*, be deemed to be vested in the consignee; subject to the right of stoppage *in transitu*, in case of insolvency. In such cases, the carrier ought to be considered as the agent of the consignee, and a delivery to the former, as equivalent to a delivery to the latter. The general principle is so, and is recognized in 8 T. R. 330, and 3 Bos. and Pul. 558. But the consignment is always subject to be controuled and explained according to the original intention of the parties, (1 T. R. 480.) Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue; and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the proposition is true, and he will be regarded as having had a con-

structive delivery made to him from the time the goods are put into the custody of the master, or carrier.

In the case of *Vale vs. Bayle*, (1 Cowp. R. 295,) Lord Mansfield lays down this proposition: "If the vendor take upon himself actually to deliver the goods to the vendee, he stands to the risk; but, if the vendee orders a particular mode of conveyance, the vendor is excused." The case of *Davis vs. James*, (2 Burr. 2680,) was this: the plaintiffs, manufacturers of cloth at *Shipton Mallet*, delivered some cloth to the defendant, a common carrier, to be delivered to one Elizabeth Bowman, at *White Chappel*, and paid the defendant for the freight. The cloth was lost, and the plaintiffs brought their action. It was objected to the action, that the property had vested in the vendee or consignee. Lord Mansfield remarked, that the vesting of property delivered to a carrier, may differ according to circumstances of cases; but it did not enter into the present case. This was an action upon the agreement between the plaintiffs and the carrier: the plaintiffs were to pay him. Therefore, the action was properly brought by the persons who agreed with him, and were to pay him. And what is the real character of the case now before the court? The customer had not bought a coat ready made, which was to be delivered to him by a particular mode indicated by himself: but had ordered a coat *to be made*, which he might or might not receive, and which he might have returned to the plaintiffs at their risk, if it did not fit him, or suit his taste. The plaintiffs, themselves, *were to make* the coat, and suggested the mere mode of conveyance which they intended to adopt to get it to their customer; and when the coat was made, they delivered it to the defendant, the owner of a coach, and paid him the freight. From the nature of the thing to be sent, from the fact of paying the defendant for carrying it, and their indicating the manner of its conveyance, it is evident the plaintiffs undertook to stand by all the risks of actual delivery to their customer. Their conduct is

a practical commentary on their understanding of the contract. The customer has no interest in the matter, and I do not see why the defendant should object to the plaintiffs' action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him. This view of the case is well authenticated by Lord Kenyon's judgment in *Daves vs. Peck*, in which he alludes to, and speaks in terms of approbation of the case of *Davis vs. James*.

Motion dismissed; GANTT, EVANS, and EARLE, JJ. concurring.

John Heast vs. George Sybert.

A promissory note to the mother of a child who has been beaten, in consideration of not prosecuting, is void. For a parent has no action for an assault and battery on his child.

And the note to the mother will not be considered to be for the child's benefit.

Before BUTLER, J. at Abbeville, Spring Term, 1840.

SUM. PRO. on a promissory note drawn payable to "Mrs. Earnest or bearer."

Jacob Lasseter having fought and beaten the son of Mrs. Earnest, (both were under age,) she demanded permission to punish Lasseter, herself; and, as this was not allowed, she threatened to commence a prosecution, or some other legal proceeding against him. The defendant, Sybert, either voluntarily, or at the instance of Lasseter, with a view of stopping the proceedings at law, gave the note in question; expecting

that Lasseter's guardian, then absent, would pay it; and the prosecution was dropped.

The plaintiff, who was executor of the will of Lasseter's father, got the note from Mrs. Earnest by substituting others in payment of it. Lasseter's guardian refused to pay the note, and the plaintiff, therefore, brought this action against the maker.

The court decreed for the defendant, on account of the insufficiency of the consideration of the notes.

The plaintiff appealed, and moved to reverse the decision of the court below, on the ground that there was a sufficient consideration.

1. The mother had a right of action for the beating of her infant son, and has sustained a loss by abandoning suit, in consideration of the note.

2. The mother was *proclaim ami*, and the note to her was in satisfaction of her infant son's right of action, and should be considered to be for his benefit, and in trust for him.

Curia, per BUTLER, J. The cases of *Corley vs. Williams* and *Matthieson vs. Hanks*, (the first in 1 Bail. R. 588, and the other in 2 Hill R. 525,) have been relied on in the argument of this case.

In the first of these cases, the plaintiff had instituted a prosecution against one Kerksey, for an assault and battery. The defendant was one of Kerksey's securities for his appearance to answer to the charge. Kerksey having absconded, the defendant gave his note in consideration of the plaintiff's dropping the prosecution. It was held that the note was not recoverable, for the consideration was illegal and void. In the case of *Matthieson vs. Hanks*, subsequently decided, the case of *Corley vs. Williams* was overruled, and it was held that a note given in satisfaction of an assault and battery is valid. The note, there, was given by the party who had committed the assault to him who had suffered the

injury, and who had a right to maintain his civil action for trespass.

The case under consideration is distinguished from the above in several particulars. The note sued on here was given by a third party, who had committed no wrong for which he could have been held accountable. No action, or right of action against him was compromised, nor was there any consideration by which he could be benefitted. But, if Mrs. Earnest, to whom the note was given, had received such an injury as to entitle her to maintain an action at law in her own name against Lasseter, to recover damages for herself, then the compromise of an injury to herself would be a sufficient consideration to support the promise, whether the defendant was to be benefitted or not.

I think it very clear that Mrs. Earnest could not have brought a civil action against Lasseter in her own name, to obtain compensation for any injury to her legal rights. For any trespass on the person of a minor, or for any injury to his reputation by defamatory words, the action is always brought in the name of the minor by his guardian or *porchein ami*; and, for the same reason that an action should be thus brought for an injury to a minor's land, or personal property, viz. because the proceeds of the verdict would belong, not to the guardian, but to the minor. So far as regards their rights in such cases, the parent occupies the place of the guardian. I do not think a case could be quoted where the action has been brought, in the name and for the benefit of the parent, for an assault and battery on the person of his child. For the seduction of a daughter, the parent brings the action *per quod servitium amisit*; but this is an acknowledged exception to the general rule, and for reasons which peculiarly concern the parent's household and sanctity of habitation. A fiction is resorted to, to give a remedy for a wrong as nearly personal as can be, without affecting the individual, or by marriage, the relative identity of the parent.

The note, in this case, was made payable to Mrs. Earnest or bearer, and for her own benefit, not to her for the benefit of her child. The child may yet have his right of action against Lasseter.

According to these views, the decision below should be supported, but there is another view that may be taken, and which will equally support the circuit decision. Heast, the plaintiff, having in his hands, as executor, the funds of young Lasseter, had a right to make payments on his account and for his benefit. The note given by the defendant to Mrs. Earnest, was taken up by Heast, at the instance, it would seem, of Lasseter. It was paid off, and should have been delivered to the defendant; and the money paid for it should have been charged as so much paid, laid out and expended for Lasseter's use. If Heast has imprudently paid over to Lasseter the fund from which he might have retained this sum, let him look to his bond of indemnity, or to such other source as he may think proper, for remuneration.

Motion dismissed; GANTT, EVANS and EARLE, JJ. concurring.

Wardlaw & Perrin for the motion, *Burt & Tompson*, contra.

Alexander Austin vs. J. W. Simpson and others, Commissioners of Roads.

Bond, to "keep up and in good repair," a certain bridge, for seven years, "and fully indemnify and save harmless," the Commissioners of Roads for any injury, loss, &c. they might sustain by its deficiency. The obligor was liable for neglect to repair which occasioned expense *after*, although not during the term.

And it seems he would have been liable for any expense incurred by the Commissioners in making, during the term, proper repairs which he had neglected.

Before EARLE, J. at Laurens, Spring Term, 1840.

This was an action against Austin, as security of one Campbell, upon a penal bond. This instrument, after the recital that Campbell had built a certain bridge over Little river, under a contract with the plaintiff, was conditioned, "that if the aforesaid Campbell will well and truly keep up and in good repair the aforesaid bridge, for the aforesaid bounds, and fully indemnify and save harmless the aforesaid Commissioners, and their successors in office, against any and all injury, loss, damage, or liability which they may sustain on account of the said bridge, by washing away or [being] out of repair, or in any other manner deficient, for the term of seven years from the date, then the bond to be null and void." Pleas—general performance and *non damnificatus*.

It appeared that the bridge had been very much out of repair, and that the sleepers had twice broken through with loaded wagons. It had been occasionally, but very imperfectly repaired, and was not safe. Loaded wagons were, for a considerable time, compelled to cross by another bridge, five miles out of their way. There was no proof that the Commissioners had ever caused the bridge to be repaired at their expense, or at that of the district, or that actual damage had been sustained by any one: But, if the bridge had been kept in repair, according to the terms of the bond, a new one would not have been necessary for several years longer.

The jury were instructed that they could not find damages against the defendant by way of punishment; that, if losses had been actually sustained, they must be reimbursed; and whatever actual damage had been suffered by the Commissioners, or the public, if they could ascertain it, they must find:—that the terms of the bond were unambiguous, and required the obligors to keep the bridge up and in good repair; and, if in consequence of its not being so kept up, a new bridge was rendered necessary several years earlier than

it would otherwise have been, it was a damage for which the plaintiffs were entitled to recover.

Verdict for the plaintiff, twenty-five dollars—the estimated value of such repairs as would have preserved the bridge, if timely made.

The defendant appealed, by motion for a new trial, on the ground of error in the judge's charge; the bond being in fact, only a bond of indemnity for the term specified, and no injury whatever being proved to have accrued to the plaintiffs during that term.

Curia, per EARLE, J. We are all of opinion that the instructions given to the jury were very proper, and, at least, that the defendant has no cause to find fault with them. The condition of the bond is, clearly, a covenant to keep in repair, as well as to indemnify and save harmless. If the commissioners, on the bridge falling out of repair, had, after notice to the defendant, caused it to be thoroughly repaired at their own charge, they could have recovered from the defendant the full amount laid out. I cannot understand how an obligation such as this, can be construed to mean only a covenant that the bridge shall remain standing until the end of the specified term, although it may be impassable, and, if the forbearance of the community saves the commissioners from prosecution, that the covenant goes for nothing. We cannot so construe the condition of the bond, without repealing a material clause of the covenant, and the first that is set down, "that if the aforesaid Campbell will well and truly keep up and in good repair the aforesaid bridge." On the construction contended for, we must strike that out, or declare that it has no meaning.

There were no actual losses proved to have been sustained by individuals. Whether such a covenant would render the obligor liable to make good the damages sustained by private persons, in consequence of the bridge being out of repair,

may deserve serious consideration. The question does not arise here, and need not be discussed. As none were proved, and as the commissioners had not been indicted, there seems to have been no other just standard of damages than that which was adopted, unless the penalty were to be regarded as stipulated damages, which could hardly have been intended. If, in consequence of the bridge being permitted to fall into decay, without timely repairs, the Commissioners acting for the public were obliged to cause a new bridge to be built much earlier than would have been necessary if such repairs had been made, it would seem to be a damage naturally resulting from the defendant's breach of his covenant, and would entitle the plaintiffs to recover the amount which such reasonable repairs would have cost; unless, indeed, it be held that the covenant and obligation were intended solely for the personal security and protection of the Commissioners, as individuals, which does not deserve consideration.

The motion for new trial is refused.

The whole court concurred.

Irby for the motion.

Jane Steel vs. Jennings & Beatty.

To charge a firm with money borrowed by a partner, it is enough that the borrowing was on the *credit* of the firm, whether for *its use* or not.

Before RICHARDSON, J. *at York, Spring Term, 1840.*

This was an action for money borrowed by Jennings, who had been a partner in trade with Beatty. Beatty's defence was, that it was no partnership debt. On this point, the jury

were instructed that the question was, did Jennings borrow the money for himself only, or for the firm.

Verdict for the plaintiff against Jennings, but in favor of Beatty.

The plaintiff appealed, and moved for a new trial, on the ground that the true issue should have been, whether the plaintiff had lent her money on the faith and credit of the firm.

Curia, per RICHARDSON, J. The proper principle of the case is that, if the money was borrowed by Jennings upon the credit of the firm, no matter to whose use it was applied, or to be applied, the lender ought to recover against both the partners.

But, in charging that the true question was, "did Jennings borrow the money for himself only, or for the firm?" the Court should have said, "for himself only," *and upon his own credit only*. Otherwise, it would be implied that, although the money may have been borrowed on the credit of the firm, yet, if for the use of Jennings alone, the lender could not recover from the other partner; and the jury may have been led into error in regard to the precise legal principle of the case, as that depended upon whether the plaintiff gave credit to the firm, or to Jennings alone.

A new trial is therefore ordered.

The whole court concurred.

A. W. Thompson for the motion.

A. Fitch, Assignee of Jesse Debruhl, Sheriff of Richland, vs. John H. Heise.

Writ served on two and declaration against only one of them, is a variance fatal on special demurrer.

On a cause of action several, as well as joint, plaintiff may discontinue as to the rest, declaring against one, *by leave of Court*, but not otherwise.

Before O'NEALL, J. at Columbia, March Extra Term, 1840.

Action on the joint and several bond of *Heise, Neuffer and Straus*. The writ was sued out against them all, served on Heise and Straus, and returned *non est.* as to Neuffer. The plaintiff, entering on the writ a discontinuance as to Neuffer and Straus, declared against Heise alone. Demurrer, for variance between the writ and declaration, was overruled by the Court.

The defendant moved the Court of Appeals to reverse this decision.

Curia, per EVANS, J. There can be no doubt that, according to our practice, a variance between the writ and the declaration is fatal on special demurrer. The decided cases, *Young vs. Grey*, (1 M'C. R. 211,) and *Sargeant vs. Hayne*, (2 Hill R. 585,) are cases of variance in the cause of action, and not in the parties to the suit, but this I do not consider can make any difference.

I think it equally clear that, where the cause of action is several, as well as joint, the plaintiff may at any time discontinue as to all the defendants except one, and declare and take judgment against him on his several promise, or obligation. This however, does not authorize him to discontinue otherwise than according to the practice of the court; and I think all the authorities are, that it can only be done by leave of the court. (2 Sellon 334; 3 Tidd. 159.) In this case the plaintiff undertook to discontinue by a mere indorse-

ment on his writ. This was no legal discontinuance, and there was consequently a variance between the writ and the declaration. It is no answer to this to say, the motion is usually granted of course; so also are many others, such as leave to file declarations and to plead double. The motion to reverse the decision of the court is granted.

GANTT, RICHARDSON and EARLE, JJ. concurred,

Gregg for the motion; *Black*, contra.

Wm. Stucky vs. James Clyburn.

An express warranty of soundness, in the bill of sale of a negro, precluded the implication of warranty of other representations on the same paper; as, that the negro was forty years old.

A written warranty cannot be limited by parol evidence, (as, of the purchaser's knowledge of a defect,) unless unintelligible without it.

A *hernia*, known to the buyer of a negro, was not one of those "defects that are plain and obvious to the senses of the purchaser, and required no skill to detect them," and which are not covered by an express warranty of soundness.

As to such obvious defects as are excepted from the scope of an express warranty, "I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness."—*Evans, J.*

Before O'NEALL, J. at Kershaw, Spring Term, 1840.

Assumpsit on the warranty of a negro man, Ned, sold by defendant to the plaintiff. The bill of sale was in consideration of \$700, described Ned as about forty years of age, and warranted him sound in body and mind.

Evidence was offered to shew that Ned was much beyond forty, probably between sixty and seventy years old; but it was not admitted by the presiding Judge, who considered

that part of the bill of sale to be mere description, and that the express warranty of soundness, precluded the implication of any other.

It appeared that the negro was ruptured at the time of the sale, and was worth, then, from \$200 to \$400; and that he died about a year after. The jury were instructed "that, if the rupture was so apparent that it must have been seen and known by the plaintiff, then the warranty would not cover it, and their verdict ought to be for the defendant. If, however, it was not, that then, the plaintiff was entitled to recover the difference of the value of the negro in his unsound condition, and the price paid for him." Verdict for the plaintiff, \$12.

The defendant moved the Court of Appeals for a new trial, on the ground that evidence of the negro's age had been improperly excluded; and also, that the verdict ought to have been either for the defendant, or for such a sum, in behalf of the plaintiff, as the evidence proved the negro to have been depreciated by reason of the unsoundness.

Curia, per EVANS, J. On the first ground, I agree with the presiding Judge, that the age of the negro, as set forth in the bill of sale, is mere description. It is not unsoundness; and the warranty that the negro was sound in body and mind, precluded the implication that any thing else was intended to be warranted. (*Chitty on Con.* 359; *1 Bing.* 324.) The rule in relation to implied warranties is, that they do not extend to defects known to the buyer, and that no implication of warranty can arise where the defect was obvious to the senses; because such defects were, or should have been, known to him. A different rule, however, must govern in relation to express warranties, and especially those that are written; because the contract is to be construed most strongly against the warrantor, and because, for any thing we can know, the warranty was given expressly to cover the exist-

ing, known unsoundness. Besides, a written contract can neither be enlarged, nor limited by parol; and to admit evidence that the disease was obvious to the senses, and from hence to infer that the buyer knew of its existence, and consequently, that it is not included in the warranty as understood by the parties at the time, is in no respect different from the admission of parol evidence of an agreement between the parties, that the seller was not to warrant against the defect complained of. In the one case, the general words of the warranty are limited by an inference from the facts; in the other, they are controuled by the parol agreement of the parties; and in both cases, the contract is altered, and effect given to it different from its obvious meaning on its face. There are cases in which the facts and circumstances connected with the contract at its creation may be resorted to as a means of interpretation. But, they are those, where, without it, the contract would be wholly inoperative, because it was unintelligible. Of this description is the case of *Collins vs. Lemasters & Lee*, (2 Bailey R. 141.) The general rule is, that a contract in writing is to be interpreted by itself, and especially if it has, on the face of it, a plain and intelligible meaning.

I have thought it necessary to say this much on the subject of express written warranty, because, it seems from the report, the presiding Judge charged the jury that, if the rupture was so apparent that it must have been seen and known by the plaintiff, then the warranty did not cover it. It seems to have been supposed that this case came within the reasons of the principles stated in *Wallace vs. Frazier*, (2 N. & M'C. R. 517.) The rule, as stated in that case, (and the same is to be found in Chitty on Contracts,) is, that a general warranty "will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and require no skill to detect them;" and the cases stated are the loss of an arm, a leg, or an eye. It does not seem to me that

the fact of the buyer's knowledge does, *per se*, exclude the case from the warranty; for in the case of *Wallace vs. Frazier*, it was clear, the disease was known to the purchaser when he bought, and yet the court held the vendor bound by the warranty. I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness. We do not understand, either in legal, or common parlance, that a negro is unsound because he wants a leg, or an arm, or a horse because he wants a tail; although the capacity of the negro for work, and the beauty of the horse are both greatly diminished by the deficiency. But, whatever may be the reasons for excluding these cases from the warranty, they do not apply to a clear case of disease.

It is said, in (Chitty on Contracts, 369,) that unsoundness in a horse is any "organic defect, any infirmity which renders it unfit for use and convenience;" and the same definition, as to physical unsoundness, will apply as well to a negro as to a horse. The disease alledged in this case, was a rupture, or what is called hernia. It is frequently very obvious, but its effects on the value of the negro, it requires skill and knowledge to ascertain. Sometimes it is of no little injury to him, in other cases he is rendered wholly worthless. It is not a defect that it requires "no skill to detect." In many cases no skill, or science can ascertain its effects fully; they are developed by time alone. It seems to me that this case is unlike the loss of a leg, or arm, and that it cannot be excluded from the general warranty against unsoundness, unless we adopt the broad principle that the purchaser's knowledge of the existence of the defect, shall, in all cases, exempt the seller from liability on his warranty in cases of express, as well as of implied warranty. For such a principle there is neither argument, nor authority.

For these reasons, it would seem that that part of the

charge hereinbefore quoted was error, and, if the jury had found for the defendant, I should think a new trial should be ordered. But, as the jury found for the plaintiff, the error could not have had any influence on their verdict.

The contract of warranty is an undertaking to indemnify for any injury sustained by the breach of it. What the damages were, it is not easy to gather from the testimony. None of the witnesses express any opinion of the extent to which the value of the negro was diminished by the disease. They say the price was much beyond his value; and it probably was so, even if he had been sound. Diminution of value by reason of a disease is, at best, but opinion, and with all the facts before them, the jury were as competent to form an opinion as the witnesses. We cannot, therefore, say that the jury have found less than the injury sustained by the plaintiff.

Motion dismissed; RICHARDSON, EARLE and BUTLER, JJ. concurring.

Withers for the motion; *J. M. DeSaussure*, contra.

E. R. Wilson vs. Alexander Ferguson.

A warranty of soundness given after the completion of a sale, being *under seal*, could not be impeached for want of consideration.

Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages.

A swelling in the abdomen of a negro woman, plainly visible, and known to the purchaser, it seems was no exception to the general scope of an express warranty of soundness; though no ill consequences were shewn from the malformation, and the woman did full work.

Before O'NEALL, J. at Darlington, Spring Term, 1840.

Covenant on an express warranty, under seal, of the soundness of a negro woman. The purchaser, at first, took a bill of sale with only the usual warranty of title; but, a short time after, being so advised by counsel, he demanded an express warranty of soundness. The seller reluctantly executed that on which this action is brought.

The objection to the woman was an enlargement of the abdomen. It was observed at the time of sale by a physician, who examined her, at the plaintiff's request, and advised him not to make the trade. The opinion of witnesses was, that her value was materially impaired by this affection; but she did her full work. Two physicians, examined, said, it was not disease, but an unnatural state of the abdomen, and might be considered a physical defect. The plaintiff gave for the woman, with a sound child, \$7 50, which was rather below the current price for sound property.

Some months after the purchase, plaintiff told defendant that he wished to give up the negroes on account of unsoundness. The latter replied that he was long in finding that out. The negroes were not then present.

The jury were instructed that an express warranty covered defects known to the buyer, as well as unknown, unless so obvious to the senses that no skill was needed to detect them; but that, in this case, the express warranty having no other consideration but the pre-existing implied one, was only a substitute for that: that there was no tender of the slaves to constitute a rescinding of the contract, and that they could therefore find for the plaintiff no more than the difference between the value and the price given, with interest from the sale. Verdict, \$50.

The plaintiff moved for a new trial on the following grounds:

That his warranty did embrace all defects, as well known, as unknown.

That, having tendered back the slaves, he was entitled to the whole purchase money, if to anything.

That the verdict was not commensurate with the unsoundness proved.

Curia, per EVANS, J. This case, in most of its features, is like the case of *Stucky vs. Clyburn*. In that case, I took occasion to express my opinion of the nature and extent of an express written contract of soundness, and how far it would be affected by defects known to the buyer at the time. I do not perceive any thing in the charge, as reported, at variance with the principles there laid down. It is stated in the report, that the "jury were told, that generally, when there is an express warranty, it would be wholly immaterial whether the defect was made known to the buyer, or whether the property was examined for him by a physician; for the purchaser then, would have the right to stand on the express warranty, and would be entitled to recover, notwithstanding such proof." It is clear, the circuit court did not consider the enlarged abdomen of the woman as one of those defects that are plain and obvious to the senses, and requires no skill to detect them. Her appearance was at least equivocal; it might be disease, or it might be that which would be removed in the ordinary course of nature, and whether it was the one or the other, could be ascertained only by a minute examination, and more knowledge of the subject than purchasers generally possess.

It is said in (*Chitty on Contracts*, 361,) that a warranty, after the sale was complete, or the contract was performed, would not seem to be binding for want of consideration." This is because the agreement to warrant is gratuitous merely, and not founded on any consideration passing between the parties at the time. And if the contract in this case had

been parol, this would have been the case, but no contract under seal is open to the objection that it is *nudum pactum*. And I cannot doubt that this distinction was not present to the mind of the presiding Judge, when he told the jury that the subsequent express warranty ought to be considered as a substitute for the implied one, "and then, if the purchaser was fully informed as to the condition of the property by the physician, (Dr. Dargan,) he ought not to recover." The jury did not find this fact to exist, for their verdict is inconsistent with it, and it is noticed here only because, as the case may be reported, other persons may be misled by the supposition, that it had received the sanction of this court.

The only remaining points in the case, are those that relate to the damages. The plaintiff contends that, as he offered to return the negro, he was entitled to recover back the whole purchase money. We concur with the presiding Judge: there was no sufficient tender of the slave to justify a rescision of the contract. And besides, the plaintiff's action is on the covenant, and he claims damages for a breach. There have been cases, where the whole amount of the purchase money has been recovered in an action on the warranty, but then it was because the property was utterly worthless, and damages were sustained to the full amount of the money paid. Until the contract is rescinded, or the buyer has tendered it back in reasonable time, which is equivalent to rescision if he had a right to do so, no action for money had and received will lie until this is done; the plaintiff's remedy is on the warranty, and his damages must be regulated by the injury he has sustained. Of this the jury were the judges; and it seems to me, that on a question of this sort, with all the facts before them, the opinion of the jury on the amount of damage sustained is entitled to as much respect, and is as apt to be right, as the opinion of the witnesses.

The motion is dismissed.

RICHARDSON, EARLE and BUTLER, JJ. concurred,

Dargan for the motion ; *Sims*, contra.

Samuel Woodburn vs. Robert Miller.

"A report has gone abroad, through the instrumentality of S. W. stating that R. M. had a load or parcel of falsely packed or plated cotton bales ; which report is a direct falsehood." This, printed and published, with malice, was a libel.

A copy of the newspaper in which a libel was published, with proof of defendant's acknowledgement that he had handed it to the Editor for insertion, was proper evidence of publication.

Defendant, in libel, had charged the plaintiff with having falsely accused him of crime. On trial, defendant gave proof, in mitigation, of the falsehood of the accusation : plaintiff was entitled to reply with evidence of its truth.

Before RICHARDSON, J. at Chester, Spring Term, 1840.

Special action for malicious publication of a libel in the "Times" newspaper of June 8, 1838. The publication was as follows :

"A LITTLE CAUTION. A report has gone abroad, through the instrumentality of Samuel Woodburn, stating that Robert Miller, of Chester district, had in Columbia, on the 16th of February last, a load or parcel of falsely packed or plated cotton bales ; which report is a direct falsehood. Said Miller had not a single bale of cotton in Columbia at or near that date, of any description whatever. Meddlers will take care how they distribute falsehoods, lest they meet with difficulties in the way."

The evidence of publication was the printed paper, and proof of the defendant's acknowledgement that he had handed it to the Editor at Columbia, with directions to give it three insertions in the "Times" and "Telescope." The defendant objected to this, as not the best evidence, and de-

manded the production of the original manuscript ; but the exception was overruled.

The defendant then moved for a non-suit, because the publication was no libel. Motion refused.

Evidence being adduced, in defence, that Woodburn had made the charge of false packing, and that it was false, the plaintiff, in reply, offered proof of circumstances to substantiate the accusation ; which was excepted to by the defendant, but admitted.

The jury were charged that the publication was a libel in terms : that the question for them was, whether defendant had published it, and whether he had done so maliciously, and not in self defence.

The defendant appealed by motion for nonsuit, and failing that, for a new trial.

Curia, per EVANS, J. I propose to consider and decide these questions :

1st. Was this a libel?

2d. Was the evidence sufficient to charge the defendant with the publication of it ?

3rd. Was it admissible for the plaintiff in reply, to shew that what he had stated of the defendant was true?

There are other grounds taken in the notice of appeal, but it is not thought that they are of such doubtful character as to require any opinion of this court upon them.

1st. The plain and obvious meaning of this publication is, that the plaintiff had fabricated and circulated a falsehood about the defendant. Such words, if spoken, would not be actionable ; but, according to all the authorities, if printed or written, they would be. (Starkie on Libel, 155 ; 2 Wilson, 403 ; *Fonville vs. McNease*, Dudley R. 303 ; *State vs. Farley*, 4 McCord, 117.)

2d. The printing of the libel was a publication ; and the only question on this part of the case was, did the defendant

procure it to be published in the newspaper. As a general rule, it may be laid down, that any fact may be proved by the admission of the party to be charged by it, except those few cases in which the law requires other evidence. If the defendant, after reading the publication in the newspaper, or hearing it read, had said, "I wrote it and caused it to be published in the Telescope, or Times," could any evidence be more satisfactory of the fact of publication? If so, then it follows that the production of the original manuscript was not, as is contended, indispensable in this case. The defendant's admissions are not as explicit as in the case above stated, but they were evidence of the fact, and, as the result has proved, satisfactory evidence to the jury, that the libellous paragraph in the newspaper was published by the defendant. The general rule is, that a witness shall not be allowed to speak of the contents of a written instrument, because the writing itself is better evidence than the witness's recollection. That was the objection in the cases quoted and relied on in the argument. *Adams vs. Kelly*. (21 Eng. C. L. Rep. 403.) But there is nothing in that case at variance with the principles laid down in this.

3rd. To decide the 3rd. ground, it is scarcely necessary to do more than state the facts. The defendant, in mitigation, went into evidence that the plaintiff had propagated the story of his having sold cotton, falsely packed, in Columbia. To this the plaintiff replied by proving the truth of the facts which he had stated, and the information he had received from Scott on the subject. This was, as the presiding Judge reports, strictly in reply to the defendant's evidence. The motions are dismissed.

GANTT, RICHARDSON, EARLE and BUTLER, JJ. concurred.

*John M. Dargan vs. Wm. E. Richardson, Sheriff of
Sumter District.*

An assignment, by letter, of goods, to indemnify one who had paid money as security, was good against creditors attaching before the letter was received or the assignment accepted, and took effect from its date.

Before O'NEALL, J. at Sumter, Spring Term, 1840.

The plaintiff, in this case, as security of one Long, paid \$40 on his account. Long, being about to leave the State, addressed a letter to the plaintiff, making an assignment to him of all his goods as an indemnity. After the date of this letter, but before it reached the plaintiff, attachments had been levied, under which the goods were afterwards sold by the defendant, as sheriff. This action was a *sum. pro.* to recover his \$40 out of the proceeds of the sale.

As the letter was not a deed, but a parol assignment, the Court thought it was good, and took effect from its date; and decreed for the plaintiff.

The defendant appealed, on the ground that the letter conveyed no interest to the plaintiff till it was delivered and accepted by him.

Curia, per GANTT, J. In reviewing the circumstances of this case, I can see no reason to impugn the decision of the Judge presiding in the court below. It seems to be admitted that the only requisite to complete the transfer, was the acceptance of Dargan. Now, what possible motive could Dargan have had to induce him to decline acceptance? He had been security for Long, and had paid money on account of it; and it would be a singular presumption to infer that he would be opposed to receiving back what he had expended. The presumption of the common law, indeed one of its maxims, if my memory be correct, is, that a man will not re-

nounce that which is done for his benefit. A presumption verified in this instance, by Dargan's immediate assent on the receipt of Long's letter, to the transfer made in his behalf. From what point of time, then, under existing circumstances, shall this transfer of property, from Long to Dargan, be considered as having taken place. From the date of the letter, or the receipt of it by Dargan? I think that it should be referred back to the date of the letter. It was then that Long, the owner of the property, transferred all his right and interest to Dargan, whose after acceptance consummated the efficacy of the transfer at the time it was made. Thus considered, Dargan became the owner of the property prior to the levying the attachments, and his just claim must have precedence over the claim of the attaching creditors. In this view of the law, I feel myself strongly supported by what was adjudged in the case of *Nathaniel G. Prime vs. Samuel Yates et al.* attaching creditors of Lockwood, decided in Charleston in the year 1816, (2 Tread. 770.) The question there involved, was elaborately argued by very able and distinguished members of the Charleston bar, Ford, Simmons, Prioleau and Cheves; and the doctrine asserted by Justice NOTT, to which, with Judge GRIMKE, I then assented, seems yet, for aught that has been urged to the contrary, to be good law. From the close analogy between the cases, the bearing of that opinion may be regarded as decisive upon the present issue.

Lockwood was in Charleston, and owner of the schooner Mary Ann. He was indebted to Prime, the plaintiff, who lived in New York. Blagge, the father-in-law of Lockwood, also resided in New York, and had become security for Lockwood's debt to Prime. Blagge addressed a letter to Lockwood, pressing to be relieved from his responsibility. Lockwood executed a bill of sale to Blagge for the schooner, and inclosed it in a letter addressed to Dr. Joseph Walden, of Charleston, on the 10th April, 1808. On the same day,

Lockwood wrote another letter to Blagge, informing him that he had left the bill of sale with Walden for him. Lockwood immediately after put to sea in another vessel, and never returned. Blagge assigned his interest in the schooner to Prime, in discharge of Lockwood's debt. Walden, the day after he received the bill of sale, took possession of the vessel for Blagge; but had received no letters, or other powers from Blagge, constituting him his agent. On the 14th of April, and whilst the bill of sale remained in Walden's possession, the defendants, Yates and others, creditors of Lockwood, levied their attachments.

These were the leading circumstances of the case, and the question submitted for adjudication was, whether Prime, the vendee, or Yates and others, the attaching creditors of Lockwood, were entitled to the property attached. Judge NORT, who wrote the opinion of the court, said, that the transfer by Lockwood amounted to a complete divestiture of the property, and that if the consent of Blagge was necessary, it must be presumed from all the circumstances of the case.

I would in like manner say, in the case before us, that the transfer by Long amounted to a complete divestiture of the property, and if the consent of Dargan was necessary, it must be presumed, from all the circumstances of the case; a presumption which has for its foundation the maxim of the common law to which I have already referred. It has been said, that Long might have countermanded the delivery of the letter containing his transfer of the goods, at any time before Dargan received it. That he might have done so, is questionable. That he did nothing to invalidate the efficacy of the transfer, is manifest.

If a bill of sale, (as has been decided,) delivered to a stranger for the use of a third person, is a valid transfer from the date of delivery, if the vendee accepts; by parity of reason, where a transfer of personal property is made by writing contained in a letter, if the person to whom the letter is address-

ed accepts it, it shall have relation back to the date of the letter. These circumstances all took place in the case under consideration, and the conclusion to be drawn therefrom is, that Dargan became the owner of the goods from the date of the letter, and is justly entitled, out of the proceeds of the sale, to the amount Long was indebted to him, and for which amount the decree below was given. The appellant can take nothing by his motion, which is dismissed.

EVANS, EARLE and BUTLER, JJ. concurred.

Richardson for the motion; *Garden*, contra.

Daniel O. Williams and wife vs. James McAliley. The same vs. Hiram Shannon. The same vs. Joseph Fullarton. The same vs. Robert Fullarton.

The possession of an heir, in land, attaches to and is continuous with that of his ancestor, for the purposes of the statute of limitations.

The possession of a tenant holding under an ancestor, inures to the heir, and constitutes a continuous possession for his benefit.

The tenant of a landlord who died before completing his title by possession, could not hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another.

Plaintiff in trespass, a minor, had acquired a title, by possession of part of a tract, with colour of title to the whole; but, before her statutory right was matured, the defendant, also with colour of title, had settled on part of the same tract, and kept possession for many years. Defendant's title was good to the extent of his actual occupation, before the maturity of plaintiff's right; for it is the right, and not the unauthorized possession of a minor, that is protected from the operation of the statute of limitations.

Before O'NEALL, J. at Chester, Fall Term, 1839.

These four cases were actions of trespass to try titles to a tract of land containing nine hundred and forty-two acres.

The plaintiff, Mrs. Williams, was the only surviving child of Samuel Lacey, who died in Mississippi, in August, 1814. She and her mother, who are residents of Mississippi, are entitled to his real estate in equal moieties. They claimed under a grant to Samuel Lacey, covering the *locus in quo*. It was surveyed for him on the 21st of April, 1800; his platt was lodged in the Surveyor General's office on the 17th of October, 1800, and the grant issued on the 3rd of November, 1800.

Col. Thomas Davis, the agent of Samuel Lacey, rented, in the fall of 1813, the land to one of the defendants, Joseph Fullarton, upon the terms that he was to stay on the land as long as he pleased, paying 25 cents per annum rent. He accordingly entered upon the land, and was known as the tenant of Lacey to all the neighborhood, and to the principal defendant, James McAliley, under whom all the others held. On the 3rd of August, 1818, Fullarton took out a grant in his own name, for a part of the land covering the spot in his possession. On the 6th of April, 1824, he became the tenant of James McAliley. The defendant, Joseph Fullarton, was examined as a witness by the defendant James McAliley: he said he never would have disputed Lacey's title, that he always admitted he was a tenant under it, and would have given up to Lacey's heirs at any time: he would, he said, have held the land against McAliley, if he could. The plaintiff, Mrs. Williams, was born in 1813.

It appeared that the land in dispute was covered by a baronial grant to Edward Lowndes, in '75; but the defendant, James McAliley, did not enter under nor hold by that grant. He entered into possession of the land in 1817, under a grant to his father, Wm. McAliley, bearing date the 3rd of November, 1800; the survey was junior to that of Lacey:—18th October, 1800. Richard McAliley, a tenant of William McAliley, was in possession of the land before 1806. He was sued by Lacey, and a recovery

had by default, in 1806; the judgment was signed 2nd May, 1806. Wm. McAliley knew of this suit, for he told one of the witnesses he had employed McNeill to defend the suit, and he had lost it. When the sheriff went to dispossess McAliley, and to put Davis, Lacey's agent, in possession, he found the possession had been abandoned. James McAliley has had the occupation of a part of the land since 1817.

It further appeared, that Lacey agreed to give one Ross fifty acres of the land, to take possession and hold for him, and gave him a bond for titles for the same, describing it in such a way that it was marked out on the re-survey plat. Ross took possession within the limits described by his bond, about its date, February, 1803, and continued 13 years in the actual occupation: he then removed, transferring his bond, by delivery, to Morrison, by whom it was left with Major Kennedy.

The jury found for the plaintiffs, in all the cases, for the land, except that part covered by the bond of Lacey to Ross.

The defendants appealed from this verdict, and moved for a new trial, on the ground of error in the judge's charge. The points to which exception was taken were as follows:

That Fullarton's tenancy under Lacey's title, continued "until he attorned to McAliley in 1824; and even his possession since, as McAliley's tenant, might not enable him or his landlord to hold against Lacey's title, though the heirs had been under no disability; but it was unnecessary to look at that, as Mrs. Williams's non-age prevented the statute of limitations from cutting off any right which she had. I thought that Fullarton's possession, commencing under Lacey, enured to the benefit of the heirs of Lacey; and that it was to be regarded as one entire possession; for the possession of the heir and the ancestor is the same, there being no fresh disseisin and no new entry. I did not think that Fullarton's new grant ended his tenancy; he still remained in possession, and gave no notice to his landlord of his intention to hold for himself."

That "although the grants of Lacey and McAliley were issued the same day, yet Lacey's survey being the eldest, made his grant the elder and better legal title."

That even McAliley's claim to the part actually occupied by *pedis possessio* "cannot have effect, for Mrs. Williams was an infant of only four years of age when the possession commenced, and had not attained maturity more than three years when these actions were commenced."

Curia, per BUTLER, J. The report sets out very clearly and fully, all the facts out of which arise the points of law on which the judgment of this court is required. When analysed, the grounds of appeal present the naked question, were the plaintiffs entitled to recover the land by a perfect title acquired under the statute of limitation? If they can connect their possession by Joseph Fullarton's tenancy, with that of their ancestor, Samuel Lacey, the statute confers on them a good title. In other words, they must support the proposition that Joseph Fullarton's possession was that of Samuel Lacey, as long as he lived, and after his death, it was cast on them, and continued without interruption, for five years, under the first entry and disseisin.

In the fall of 1813, Fullarton was put in possession of the land as the tenant of Lacey, and was to hold coextensively with Lacey's grant; which, of itself, could confer no right, but could be resorted to only to indicate the extent of the possession under it. This, in legal contemplation, was the entry of Lacey, and was a disseisin of Lowndes who, at the time, had the true title. Lacey died in 1814, without title in himself at that time, but occupying such a position as might have given him title if he had lived. Had not his heirs a right to be remitted to his rights, or rather to take the position which he occupied, and from which rights might be acquired?

For the purpose of eliciting the true point in the case, let

it be supposed that the child of Lacey was on the premises, an infant at the time, and incapable of asserting her claim to the possession. It was said that, under such circumstances, Lacey having no right to the land, none could descend to his heir. And it is true, he had no title. But he had such a *possession* as might ripen into title. This is an interest not of such immaterial consequence as to be unnoticed by the law. Nor is the possession of the heir, thus acquired, to be regarded as a distinct possession, on his own entry, to be tacked to that of the ancestor, but a continued possession that is referable to the original entry and disseisin. So much, according to English law, is this possession of the heir respected, notwithstanding the ancestor may have been a disseisor and wrong doer, that the true owner's right of entry on it, after the death of the ancestor, would be barred, and he would be driven to his ejectment to enforce his right of entry; although by simple entry, he could have evicted the ancestor in his lifetime. For the law presumes that the possession which is transmitted from ancestor to heir is a rightful possession, until the contrary is shewn, and therefore the mere entry of him who has the right will not evict the heir.

In every complete title to lands, there are two things necessary; viz. the possession, or seisin, and the right and property therein. If the possession be severed from the property, as if A. has the *jus proprietatis*, and B, by some unlawful means, has gained the possession, this is an injury to A. for which the law gives a remedy, by putting him in possession: but it does so by different means, according to the circumstances of the case. Thus, as B, who was himself a wrong doer, and has obtained the possession either by fraud or force, has only a bare, a naked possession, without any shadow of right; A, therefore, who has both the right of property and the right of possession, may put an end to this title at once, by the summary method of entry. But if B, the wrong doer, dies seised of the lands, then B's heir advances one step

further towards a good title. That is, he has not only a bare possession, but also an apparent *jus possessionis*, or right of possession. (Run. on Eject. 42; 3 Cruise Dig. 433; *Smith vs. Lorillard*, 10 Johns. R. 338.) This is a recognition of the heir's possession, continued as well as derived from the ancestor. It is inheriting not only the title, but the position by which a title is acquirable. A possession not taken by the option of the heir, but one that is cast on him by the operation of the law.

It was contended, however, that this doctrine only applies to the actual possession of the heir, and not to the constructive and substituted possession of a tenant. This, on examination, will be found to be a fallacy. The lease of the landlord to the tenant descends to the heir, or goes to the executor for the benefit of the heir. By this the tenant could be made to pay rent after the death of his original landlord—as much so as if the landlord had been the true owner of the land. The liability of the tenant to pay rent, is not surely destroyed by the death of the landlord. Take, for instance, the case under consideration. Fullarton was to pay rent for the land as long as he continued on it. Could he not have been compelled to pay it after the death of Lacey? In an action against him, could he have disputed his liability to pay the rent that was due? If not, his tenancy would inure to the benefit of the heir, and his possession would be considered as that of the heir. A recovery on the lease would be equivalent to an acknowledgement of tenancy to the heir, after the death of the ancestor. After Lacey's death, his heirs could have recovered the land from the tenant by the lease under which he entered, although they might not have been able to recover it from another. In this point of view, Fullarton's possession may be regarded as the uninterrupted and continuous possession of Lacey and his heirs; and not as the disconnected possession of the ancestor and the heir, or as the separate possession of Fullarton, after the death of

Lacey. As long as Fullarton continued in under the lease from Lacey, he could not acquire any available title in himself. The grant which he took out in his own name could confer on him no right; as his possession would not be referred to that, but to Lacey's lease, under which he entered and had held.

The case is then reduced to this; had Fullarton five years adverse possession under Lacey's grant, as against Lowndes? He was in from the fall of 1813 till 1814, holding, as he acknowledged on the stand, for Lacey's heirs; or rather, saying that, during that time, he would have delivered possession to Lacey, if demanded. In the fall of 1818, the statutory title became perfect, and was good for all the land which Fullarton was in the actual or constructive possession of; that is, all that lay within Lacey's grant, except what was in the actual occupation of others. And, after that time, Mrs. Williams, being a minor, could not be deprived of any of the land by adverse or collusive possession of any one, until she attained full age. In other words, any possession acquired by McAliley, after the fall (October,) of 1818, could not avail him, as against the plaintiffs.

As it regards the land which he was in the actual possession of before plaintiff's possession had ripened into a title, it must be regarded in a different point of view, to be noticed presently. Before I advert to that point, I will return to an argument relied on to shew, that Mrs. Williams's possession never could have ripened into a right, by the trespass of Fullarton. It was said that, although Fullarton would not be allowed to prejudice her right and title to the land, where such right and title existed, yet, when the future acquisition of it depended on his continuing to trespass for her, he was at full liberty to stop trespassing for her benefit to the prejudice of the true owner. To this it may be replied, that if the minor's possession, at the time of the death of her father, were not altogether rightful, as against Lowndes, it was a

possession which was, at least, recognized and sanctioned by law, until eviction by action. It does not seem that Fullarton knew of Lowndes's grant, but always supposed that he held for Lacey under his grant. As long as he continued in possession, he would be regarded by the law as holding in the relation in which he entered. He was a centinel over the rights, or, at least, possession of his landlord, and could not be permitted to betray or jeopard them by acquiring title in himself, or attorning to another. Whatever *others* might have done, *he* will not be allowed to deny the claim of the one under whom he entered. This principle of law is founded in a great principle of morality that pervades all the fiduciary relations of life; that good faith, where it is honestly reposed, shall not be violated to the prejudice of the one who reposes it. Fullarton's possession must, therefore, be regarded as the possession of Mrs. Williams.

After October, 1818, Mrs. Williams had an actual possession of part, and a constructive possession of all the land lying within her father's grant, *except* what McAliley was in the actual occupation of previous to that time. Or, (to put it in a different form,) at that time, she may be supposed to have bought all the land which Fullarton was in the possession of; and it is clear, that Fullarton was not in the possession of that occupied by McAliley. For, as to that, Lowndes could not be regarded as having it in possession. McAliley occupied such a position, as would enable him to acquire title against Lowndes himself, unless evicted before the expiration of five years. This possession controuled Fullarton's constructive possession, and, to its extent, has ripened into a title in McAliley; *but beyond it he has no right*, by virtue of any possession acquired after October, 1818. It seems that he did not shew, or perhaps was not allowed to shew, how much land he had in actual occupation previous to the above time; and he must therefore have a new trial, to enable another jury to find what that possession was, and to find for the plaintiff all beyond it.

The motion is granted only so far as regards McAliley. As it regards the other defendants in the case, the motion is refused unanimously.

RICHARDSON, EVANS and EARLE, JJ. concurred.

GANTT, J. I dissent, on the ground that there was no descent cast, such as is recognized by law. A trespass constitutes no right or title; therefore nothing descended.

Gregg & McAliley for the motion; *Eaves & Thomson*, contra.

Edward Broughton vs. Jephtha Dyson.

Defendant in assumpsit, offered in discount the value of a quantity of Yarn, delivered to the plaintiff, more than he was entitled to, by mistake and without plaintiff's knowledge. *Held* that the discount could not be admitted.

Before EVANS, J. *at Sumter, Spring Term, 1840.*

This was an action of assumpsit, to which the defendant pleaded in discount, among other things, \$41 72 for 149 lbs. yarn, at 28 cents per lb.

The facts were these. Plaintiff had delivered 2520 lbs. cotton to defendant to be spun at his factory. The yarn produced was 149 lbs. less than the cotton. Defendant made up the deficiency and delivered the whole to plaintiff; the latter, however, knowing nothing about it. Afterwards, defendant ascertained that this deficiency was only the usual loss that occurred in the spinning of cotton, and therefore, charged plaintiff, in his discount, with the value of the yarn so delivered by mistake.

The jury found in favor of defendant's discount; and the plaintiff, on that ground, moved the court of appeals for a new trial.

Curia, per EVANS, J. held that, on this ground, "the motion must be granted. There is no pretence for saying that Broughton bought 149 lbs. of yarn from Dyson. It may be just that he should pay it, and I suppose the verdict of the jury arose from an attempt to do abstract justice between the parties. But all experience proves the folly of any attempt to settle the controversies of litigants by any other than the known and settled rules of law. Broughton's cotton, when spun, was deficient 149 lbs. Dyson was unable to account for it, and, without Broughton's knowledge, made up the deficiency. Afterwards, he discovered that the loss in weight was the usual consequence of converting cotton into yarn; and then charged Broughton with the yarn thus delivered. We think there is no foundation for the pretence that this was a sale; and to allow the verdict to stand, would sanction the principle, that one may make another his debtor without his knowledge or consent."

Motion dismissed; GANTT, EARLE and BUTLER, JJ. concurring. *Absent*, RICHARDSON and O'NEALL, JJ.

Moses & Miller for the motion.

The State at the relation of Antony Campbell vs. Commissioners of Roads for Laurens District.

Post Masters are not exempt from road duty.

State vs. Harrington, (2 M'C. R. 400,) and *State vs. Martindale*, (1 Bailey R. 163,) considered.

Before RICHARDSON, J. *at Laurens, Fall Term, 1839.*

This was an application for a prohibition to prevent the levying of a fine of \$8, imposed upon the defendant, a Post Master, for failing to work on the roads. The court refused the prohibition, and the defendant, thereupon, appealed.

Curia, per EVANS, J. By our Act of 1825, (p. 31,) all the male inhabitants of this State are declared liable to work on the roads, bridges and causeways. The tenth section enacts, "that from and after the passing of this Act, the following persons, and no others, shall be exempted from all liabilities to work on roads and bridges, viz. all ministers of the gospel, millers and ferrymen." This is a most comprehensive enactment. With these few exceptions, the Act embraces all the adult male inhabitants of the State.

To shew, then, that a Post Master is not liable to work on the public roads, his official exemption must be proved from something paramount to the Act, or that supercedes it in the particular instance. As, for example, that the State Act is opposed to the Federal Constitution, or to some constitutional law of Congress, a treaty, or the like, which constitute our supreme laws. But nothing of the kind is specifically suggested. The ground taken is, that the Post Master is exempt by virtue of his federal commission; that such is the necessary implication of the Federal and State constitutions under their proper construction, forming the conventional law of the confederated States, and binding on the whole Union.

But such a proposition is too general and sweeping in its consequences to be readily admitted. It would exempt federal officers from all personal service to the State by which

they are protected in person and property. These duties, between the citizen and the government, are not to be got rid of, but by pressing necessity, or by express enactment. They are inherent both in the general and the State government, and vital to their justice, order and support. They should, therefore, be permanent in their character, general in their application, and reciprocal in their obligation. We would therefore require proof, or conclusive argument, before admitting such a proposition for official exemption.

In contemplating our duties to the general and State governments, let us call to mind that the Federal and State Constitutions so constitute one context and series of a single governmental system, that we cannot expound the one without reference to both instruments. We have two Legislatures, each with its several and distinct subjects of legislation; so that neither can make a law binding, that is beyond its strict constitutional limitations, while each is supreme within its own proper sphere of powers, as granted to the one, or restricted to the other. I, therefore, conclude that, whenever Congress shall have enacted that certain federal officers shall be exempt from specific civil duties, (as some are now exempt from ordinary militia duty,) such exemption might supercede a general Act of the State, or constitute an exception to its provisions, and the two enactments would be, thus, well reconciled.

But the general principle of exemption, bottomed on the comprehensive theory that such officers are always employed officially, would, at once, exempt them from all personal services to the State of which they are citizens. They might refuse to attend court, to give evidence, to serve as jurors, to meet the tax collector at the time appointed to receive returns of taxable property, and yet, claim all the advantage and security of the State protection of person, character and property; which protection is the equivalent for the very services which they would refuse to render. We cannot reconcile such incongruity.

In the case of *Ansley vs. Timmons*, (3 M'C. R. 329,) the court decided that even aliens are liable to perform militia duty; that it is in return for personal protection, and therefore no infraction of international law. And, upon the same principle, I would say, in the language of the dissenting opinion in *Harrington's* case, (2 M'C. R. 404; in which the first constructive exemption from road duty was allowed, and where the principles, of which a brief exposition is now made, were considered more at large;) "If the President of the United States were to claim the privilege of a total exemption from any general civil duty required of the citizens of the State where he resided, I would reply to him, first throw off the protection of your person and life, your property and character, afforded by the State government, and then you may be exempt. This is the tax laid on the person, to be paid in labour. If you cannot do the labour, the law admits of any reasonable excuse, to be judged of by the proper authority; but, having offered none, you must pay the fine, which is, at once, the substitute for your labour and the price of your protection. Your office affords no privilege, and only binds you down more closely to obedience. You are still liable to be burthened according to the exigency of that local government which, in return for such services, holds an ægis over your person and property."

In the recent case of *Lieutenant Ingraham*, decided last February, (*Supra*, p. 78,) this principle was adopted, and a naval officer, then on furlough, was held liable to serve as a juror. In my opinion, that adjudication, which was unanimous, decides the present question. But, as its final decision may be thought to militate against the opinion of the Court in *Harrington's* case, (2 M'C. R. 400,) and in that of *The State vs. Martindale*, (1 Bailey R. 163,) great consideration is due to these adjudications.

In the case against *Harrington*, three Judges, against two, decided that the clerk of a court, in virtue of his office, was

exempt from working on the roads. In that of *Martindale*, two Judges, against one, in the late Court of Appeals, decided that a Judge of the Federal Court was exempt from patrol duty.

In those cases, writs of prohibition were ordered, upon the ground that both the clerk and the judge, by reason of their continued employment in their offices, were legally exempt, not merely excused, from the personal duties required of them under the general enactments of our State laws, which, in terms, admitted of no exception of men within certain ages. Accordingly, in the decision of the case now before us, I felt that an apology was due for drawing a distinction between a post master and a clerk, or a judge. But I thought the possible distinction justified an effort to arrest the extension of such exclusive personal exemption from essential duties to the State ; and I, therefore, refused the writ.

It may be regretted that the counsel did not deem it necessary to discuss the case upon doctrinal and constitutional grounds, to enquire whether the two former adjudications might not be wisely reconsidered upon arguments *ab inconvenienti*. The counsel merely referred to those cases as conclusive authority. The instance now before the court, affords a striking illustration of the evil apprehended, at the trial of *Harrington's* case, of the growing nature of such personal privileges. By the last report of the Post Master General, there are, in the United States, more than thirteen thousand post offices, or an average of five hundred to each State. If, then, Mr. Campbell be entitled to his prohibition, the five hundred post masters of this State, many of whom receive only three or four mails per week, would become exempt, *ipso facto*, with the decision in his favour. And this principle of official exemption, being once settled in favour of a few judges and clerks, and five hundred post masters, must, of course, be followed out in a long train of official exemptions. Law must be uniform in its operations ; and Judges cannot,

like Caligula, make a Consul of one favorite steed to be fed upon gilded oats, while they keep the rest of his fellows close in harness, upon straw. There certainly are some offices, as that of President, or Governor, that, of themselves, imply a reasonable excuse; but the best standing excuse cannot amount to an official letter of exemption, so as to demand a writ of prohibition, as the right of entire classes, who can shew no legislative warrant for the privilege claimed. As I hold, for myself, that the highly controverted decisions, in *Martindale's* and *Harrington's* cases, went upon mistaken principles, I have once more turned attention to the distinction between matter of excuse and the privilege of exemption. It is the proper ground of our present adjudication. 'Ex gratia' and 'ex debito justitiæ,' are two things in law.

But, without assuming that the decision in the present case overturns those of *Harrington* and *Martindale*, the decision of the circuit judge, that the post master is not entitled to the writ of prohibition against the commissioners of roads, is unanimously affirmed.

EARLE, J. In *Harrington's* case, the ground of exemption was, that by the Act of 1784, clerks of the court were required to afford access to their offices at all times of the day, from 9 o'clock in the morning until 4 o'clock in the evening, Sundays excepted, and therefore the performance of this duty was incompatible with that of working on the roads; and, although the commissioners were authorized to ascertain and declare, when the same was not ascertained by law, or where doubts might arise concerning the same, what inhabitants were liable to work on any road, yet the exemption claimed was one ascertained by law, and the jurisdiction of the commissioners did not extend to the case of the relator. But the road laws, up to that time, had provided no special exemptions, and had only declared that the roads should be kept in repair "at the equal charge and labour of all the male inhabitants from the age of 16 to 50 years."

The Act of 1825, in exempting ministers of the gospel, millers and ferrymen, declares that no others shall be exempted from liability to work on roads and bridges. This enactment must be considered conclusive against the claim of exemption by any other class of persons, whether on the ground of office, or otherwise; and was probably adopted with reference to the various exemptions which might be claimed under the existing laws and judicial decisions. The duty of working on the roads is only a species of tax; a contribution which ought to be borne equally by all who live in the country, subject to its municipal regulations. And, without the Act of 1825, it would seem as reasonable and as just that one holding a public office should claim to be exempt from paying an assessment for building or repairing a bridge. A default which arises from performing some other public duty, must be left, as matter of excuse, for the commissioners.

Without reference to the grounds of former decisions, I conclude, upon the construction of the Act of 1825, that the relator, Campbell, cannot be allowed the exemption which he claims, and that the prohibition was properly refused.

EVANS, BUTLER and GANTT, JJ. concurred in this opinion.

Martin & Cornwell vs. Allen Kelly.

SUM. Pro. brought in the mercantile name of a firm, without setting out the partnership or the christian names of the partners, would have been bad upon exception by plea; but not, on motion for non-suit.

Before EARLE, J. at Laurens, Spring Term, 1840.

SUM. PRO. The style of the process was, simply, "the petition of Martin & Cornwell." The parties plaintiff were proved to be Drury Martin and William Cornwell, partners in trade.

Defendant moved for a non-suit, because the plaintiffs' christian names were not set out, nor their partnership suggested. The motion was overruled, and the defendant now renewed it before the court of appeals, as well for the reason above stated, as because the record in this case would not protect him from a second action on the same demand.

Curia, per EARLE, J. The exceptions taken to the process are, that the christian names of the plaintiffs are omitted, and that they are not described as partners. We are all of opinion that the omission of the christian names is a defect which would have been fatal by plea; but that it cannot avail on a motion for non-suit. In Comyn's Dig. (Tit. Abatement, E. 18,) it is so laid down:—"So he shall plead misnomer of the plaintiff, if his christian name be mistaken, or if his christian name be omitted." So too, it was decided in the *Mayor and Burgesses of Stafford vs. Bolton*, (1 B. & P. 44,) where a non-suit for misnomer of the plaintiffs was set aside, because it should have been pleaded in abatement. (See 10 Rep. 122.) The precise question was decided here in *Chappell & Cureton vs. Proctor*, (State Rep. 49,) where the motion was for non-suit, or in arrest of judgment, "because the declaration did not set out the plaintiffs' christian names, or that they were partners;" and the court held that the objection came too late, unless in cases where the contract given in evidence varies, as to the name of the plaintiff, from the declaration. The other part of the exception was not noticed by the court, and I conclude that it was regarded as depending on the same principle, being an omission of part

of the description of the plaintiffs, which should have been pleaded, or was wholly immaterial. If the names of all the partners are properly set out, it cannot be necessary to add that they are partners, trading under a particular name, or firm; except in cases of written contracts, in which they are designated by the name of the partnership firm; then it would be proper so to describe them, with an *alias dictus*, to avoid a variance. A contract with a partnership is only a joint contract, and it is enough to set out, in pleading, the names of all the parties, and to prove that the contract was made with all of them.

It is a mistake to suppose that this recovery would not be a bar to another action at the suit of the same plaintiffs, suing on the same demand as partners. In such case, I apprehend the record itself would furnish sufficient evidence of its being the same demand; and, if not, the deficiency might be supplied by other proof.

This is a summary process, and a notion seems to prevail, that less strictness is required, in pleading and practice, in the summary, than in the general jurisdiction. And perhaps cases may be found which lean that way.

Less strictness is requisite, perhaps, in setting out the demand, and also in pleading the defence. But the order of pleading must be observed; and, if the defendant, on the general issue, permits the plaintiff to go to trial, and to make out his case, he must be considered as waiving those exceptions on the face of the process, for which he might have demurred, or pleaded in abatement, according to the rules which prevail in the general jurisdiction.

The motion for non-suit is refused.

GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurred.

Sullivan & Campbell for the motion.

Shubar & Bunting vs. B. H. Winding.

A debtor inclosed notes &c. to one of his creditors, by letter, with directions to satisfy first his own debt, then those of other creditors designated by name. This was a good assignment, as against other attaching creditors, for the benefit of the creditors named.

Before EARLE, J. at *Edgefield*, January Term, 1840.

This was an issue on the return of Matthew Gray, a garnishee, in whose hands certain assets had been attached as the effects of Winding, the absent debtor. Mr. Gray claimed property in them for himself and other creditors to whom they had been assigned before the levy of the attachment. He relied on the following letter from Winding, which accompanied the notes and accounts when they were placed in his hands,

“The inclosed notes and accounts are all good; and out of them I wish you to pay yourself seventy-eight dollars (\$78.) Joseph Word about sixty dollars (\$60.) The balance of Dr. Holland’s account to Giddens and Bushnel; and the balance to F. M. Cooper. Gentlemen, it may take you a little time before you see these people, but I know it is good, and can do no better.”

The court held the assignment good to protect Gray, as a creditor in possession, but not to vest property in the other creditors; and ordered accordingly.

Upon an appeal being taken, his Honour, in the report of the case, expressed his conviction that his decision below had been erroneous.

Curia, per EARLE, J. It is only necessary to repeat what I have said in my report of this case; that I am satisfied the decision in the court below was erroneous. We are all of opinion, that the letter, transmitting the securities to Mr. Gray, was a valid assignment of them to him and the other credi-

tors. There can be no doubt that such was the intention of the absent debtor, for the letter seems to be addressed to all of them, and was intended to give them a preference over others, as might be lawfully done ; and in the only way in which it can well be done without suspicion of unfairness ; that is, by payment of money, or actual delivery of assets. After the receipt of the letter, the act was irrevocable on his part, and vested property in Gray for himself and, in trust, for the others. Indeed, after he had accepted the trust, and had acted upon it, by collecting the money, he assumed an agency for the others, which I think would raise an assumpsit, and enable them to maintain an action against him for money had and received. The case of *Dargan vs. Richardson*, decided this term, has held such a letter to be a valid assignment, to take effect from its date, and without delivery of the property. On the circuit, I considered Gray entitled to hold, as a creditor in possession, without reference to the effect of the letter, as an assignment. If good as an assignment to him, as it clearly was, according to *Dargan vs. Richardson*, it was equally effectual to vest property in the other creditors, for whose benefit the securities were transmitted to him, as well as for his own.

The judgment of the circuit court, so far as regards the assets in the hands of Gray, over and above his own demand, is reversed ; and the order will be reformed so as to secure the claims of the other creditors.

GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurred.

The State vs. John Chamblyss.

License to keep a tavern includes the privilege of retailing spirituous liquors.

Before O'NEALL, J. at Darlington, Spring Term, 1840.

Indictment for unlawfully retailing spirituous liquors. The facts were admitted, that defendant had retailed spirits in quantities less than three gallons; but that he was a tavern keeper, and had a license as such. The court thought that, as a tavern keeper, he might furnish his guests with drink, as a part of their entertainment, and make his charge large enough to cover it; but that he could not sell spirits, as a separate business, even to his lodgers and guests. The jury, under these instructions, found the defendant *guilty*.

The defendant moved the court of appeals for a new trial, on the ground of error in the charge of the presiding judge.

Curia, per EVANS, J. The ground assumed in the notice of appeal, asserts, in substance, that the defendant, under his tavern license, had a general right to sell spirits in small quantities to travellers, guests and other persons.

I will not stop to enquire whether he who abides an hour at a tavern is not as much a guest, as he who remains a day, or a week; nor whether there be any distinction between furnishing spirits to a guest, as a part of his entertainment, (and increasing the charge so as to cover the expense,) and furnishing it to him separate and distinct from any other entertainment. The view which we take of the subject renders such inquiries unnecessary and unprofitable.

What, then, is a tavern; and what are the rights which a license to keep a tavern confers, as to the vending of spirituous liquors? Johnson, in his dictionary, says, "a tavern is a place where wine is sold and drinkers are entertained;" and

Webster says, a tavern is "a house licensed to sell liquor in small quantities, to be drunk on the spot, and, in some of the United States, it is synonymous with inn, or hotel, and denotes a house for the entertainment of travellers, as well as for the sale of liquors." Johnson, for his definition, gives Shakspeare's authority. It is clear, from the writings of that poet, that such was the popular sense of the word in the time of Elizabeth, and Johnson's adoption of it, shews that its meaning was unchanged when he published his dictionary, in the reign of George II. The popular sense, in America, is clearly shewn by Webster's definition.

It will not be questioned that, if a word, having a clear and definite meaning in common parlance, be adopted into the law, it shall be construed according to its usual meaning; unless it appear by the lawgiver in a different sense. Let us, then, enquire whether the word, tavern, is used in our law in a different sense, or in a more restricted one than its popular meaning as above stated. I begin by saying what will not be controverted, that, at common law, the vending of spirituous liquors was not a franchise, and therefore required no license; and, as a corollary to this proposition, that until the Stat. 5 and 6 Ed. 6, c. 25, the vending of wines and other liquors was as lawful as the selling of meats or grain, or any other article of traffic. That it is within the power of the Legislature of this State to controul, to regulate and even to prohibit both the sale and the use of intoxicating drinks, it is not intended, here, to question. All that is meant to be asserted, is, that prior to that statute, there was nothing in the law which laid any restraint upon such traffic, and that it may still be carried on in all cases and under all circumstances that are not in violation of that, or of the subsequent statutes passed upon the subject.

At a very early period of the history of man, houses were set up for the purpose of vending wines and other liquors. These had, originally, their appropriate names, as inns,

taverns, ale houses, punch houses, victualling houses, porter houses, &c. I should infer, from what is said in Viner, (14 Vin. 439,) under the head of "Tavern," that the original employment of the keeper of a tavern was to sell wine alone; but, in process of time, these originally distinct employments became confounded. The seller of wines began to supply food and lodging for the wayfaring man; and, hence, the word tavern, came to mean pretty much the same as inn, at a period certainly as far back as the days of Elizabeth. Be that as it may, in our Acts of the Legislature, the word inn, has been mostly disused. It is to be found only in the Act of 1784, where it is manifestly used as synonymous with tavern. In the subsequent legislation on this subject, all other descriptive terms are discontinued, and all who are required to take a license are classed under the two heads of tavern keepers and retailers of spirituous liquors. I have gone through the legislation on the subject, in order to shew that inns and taverns are synonymous, or nearly so; and I now proceed to shew that all legislation upon the subject has proceeded on the ground that a tavern, or an inn was a house where, according to Johnson, "wine was sold and drinkers entertained."

The oldest legislation upon this subject, as I have before said, is the stat. 5 and 6 Ed. 6, c. 25, by which the keepers of ale houses and tippling houses are prohibited from carrying on their business, unless permitted by the sessions, or by two justices, who are required to take recognizance against gaming and for good order. The stat. 1 Jac. 1, c. 19, recites "that the ancient true and principal use of inns, ale houses and victualling houses, was for the receipt, relief, and lodging of wayfaring people, travelling from place to place," and not "meant for harbouring lewd and idle persons," to "spend and consume their money and time in a lewd and idle manner." This statute, following up the preamble, prohibits the inhabitants of the place where such houses are situated, from

resorting to, or "haunting" them, as it is expressed. The stat. 4 J. 1, c. 5, for repressing "the odious and loathsome vice of drunkenness," is to the same effect. The stat. 1 Car. 1, c. 4, prohibits the keeping of inns, ale and victualling houses from suffering any one to tipple in their houses; and the second clause extends the previous Acts of James I, to keepers of taverns and such as sell wines and keep wine and victuals in their houses. It is obvious, from the reading of these statutes, that an inn keeper was one whose business consisted, in part, in vending spirituous liquors, as well to the inhabitants of his town, or village, as to the traveller and wayfaring man; and, although the stat. 1 Jac. 1, c. 19, recites that the ancient true and principal business of inns and ale houses was for "the receipt, relief and lodging of wayfaring people," yet it is obvious, from the Act itself, that, at that time, a part at least, if not the "principal" part of their business, was to supply the traveller, as well as the inhabitants of their town, with the means of "spending their money and time in idleness and drunkenness."

The first statute passed upon this subject, after the settlement of Carolina, was in 1694, (2 Stat. So. Ca. 85.) It recites that the "unlimited number of *taverns*, tapp houses and punch houses, and the want of sobriety, honesty and discretion, in the owners and masters of such houses, have and will encourage all such vices as usually are the productions of drunkenness." It then goes on to enact that no person "shall sell any wine, sider, beere, brandy, rum, punch, or any strong drink under the quantity of three gallons, until he shall have obtained a license, &c. In the next year, the same, in almost the precise words, was re-enacted, (id. 113,) with an additional clause fixing the price at which wines and other liquors should be sold. It was again re-enacted, in 1703, (id. 198,) and 1709, (id. 336,) and made perpetual in 1711, (id. 362.) This closes the legislation of the Lords Proprietors. One general remark applies to all these statutes. They

declare it unlawful to sell wines and other liquors without ; but leave it, as it was before, lawful to sell them with a license. The inference is clear and unquestionable, that a tavern was then understood, by the lawmakers, to be a place where wines and other liquors were sold. The only legislation of the regal government are the Acts of 1740 and '41-2. By the first, every keeper of a "tavern," or punch house is prohibited from giving, or selling any spirituous liquors to a slave. The Act of 1741-2, requires the justices of the peace to meet in their respective parishes twice a year, to inquire into the qualifications of "such persons as shall desire licences to retail strong liquors," and to grant certificates, or orders to the public treasurer for granting licenses as aforesaid."

The next clause prohibits the public treasurer, or receiver from granting "licenses to sell spirituous liquors, or strong drink, or to keep a billiard table without an order for that purpose, signed and subscribed by the justices so assembled, and being and residing in the parish where the person, or persons so licenced shall or propose to keep a *tavern*, or punch house, or billiard table." By another clause of the same Act, the street, lane, alley, road, bridge, ferry, village, town, or other place, where the "tavern" or punch house, or billiard table is to be kept, shall be particularly mentioned and specified, both in the order and the license. Can there be a doubt, that in these statutes, taverns are spoken of as places where "strong drink" and "spirituous liquors" are sold ?

The first Act on this subject, after the revolution, is that of 1784. It provides that, (except in the parishes of St. Philips and St. Michaels,) "two or more magistrates for the respective districts of this State shall be authorized and empowered, on every Easter Monday, and the first Monday in August, to grant certificates to any person or persons in their respective districts, who may apply for the same, if in their judgments, they shall think such person or persons fit and qualified to keep a *tavern*, inn, ordinary, punch, ale house, or

billiard table, or to retail strong liquors as aforesaid; and the person or persons to whom such certificate shall be by them granted, shall produce the same to the clerk of the court of the district in which he or she shall reside;” and the clerk is required “to grant a license under his hand and seal, agreeable to the purport of the said certificate, to such person or persons, who are to pay to the clerk one dollar for his trouble, and also the sum of three pounds for every license to retail liquors, and the sum of £50 for every license to keep a billiard table.” On this statute, I would observe that the certificate is to be, that the applicant is a fit and proper person to keep a tavern, inn, ordinary, punch, ale house, or billiard table, or to retail strong liquors, and the license is to be agreeable to the purport of the certificate; so that he who applies to keep a tavern, shall have a license for that purpose, and so of the rest. But, in the subsequent part, where the amount to be paid is fixed, all these various licenses are included under two classes; viz. to retail strong liquors, and to keep a billiard table. Now this must mean that the keepers of taverns, inns and ordinaries are to pay nothing for their licenses, or that they are included in the general “license to retail strong liquors.” The latter, it seems to me, is the obvious meaning, and is in conformity with the previous legislation on the subject. The county court Act, (1 Brev. Dig. 418,) gives to the justices of that court power to grant licenses to keep taverns and public houses, and the justices are required to cause a fair rate of meat, drink and lodging and provender for horses to be made and ascertained, and the tavern keeper is required to affix the same in the most conspicuous part of his most public room, for the inspection of “*all persons calling at the said tavern.*” He is also required to give bond to keep clean and wholesome meat, drink and lodging for travellers, and the usual provender for horses. The Act of 1788 extends the jurisdiction of the county court, over taverns, to all persons who shall retail any brandy, rum &c. Here, for the

first time, those who are required to take out licenses are divided into two general classes; 1st. those who keep taverns, and 2d. those who retail any wine, rum, brandy, &c. The Act of 1781 makes no alteration in the existing law, except to authorize the county court to grant licenses at any court held in the year.

On the abolition of the county courts, their power was transferred to the commissioners of roads. By the Act of 1801, (1 Brev. Dig. 420,) they are required, at any stated meeting, to hear all applications for licenses to keep *taverns* and retail spirituous liquors, and are authorized to reject such application, or grant such license, as to them shall seem proper. Every retailer of spirituous liquor shall give bond according to law, and every person who shall obtain a tavern license, shall give bond with security, to keep clean and wholesome meat, drink and lodging for travellers, &c. In another clause, it is said that "all licensed retailers who do not keep, also, taverns and entertainment for travellers, shall pay \$15 for their license, and shall not retail less than one quart." To me, the obvious meaning of this is, that there are two classes of retailers, one who do not keep taverns and entertainment, and another who do keep taverns, and are required by law to give bond and security to keep clean and wholesome meat, drink, &c.; for the words "all licensed retailers who do *not* keep taverns," imply that there are other licensed retailers who do. The first class is limited to the sale of one quart; the other, left unrestrained in quantity, as all retailers had been before that time.

From a careful review of all these statutes, I think the conclusion is, that a "tavern is a house licensed to sell liquors in small quantities, to be drunk on the spot," and "denotes a house for the entertainment of travellers, as well as for the sale of liquors." This is the American sense in which the word is used, according to Webster; and, in looking into 2 Kent, Comm. 595, it will be found that the distinction between

tavern keepers and retailers of spirituous liquors, as is herein stated, is in conformity with the laws of New York, and of most of the States of the Union.

I have before said that, independently of the statutes which have been passed on the subject, a man might lawfully set up an inn, tavern, or ale house, without a license. That is distinctly stated in 1 *Burn's Justice*, 22, and 14 *Vin. Ab.* 436; and I think it is very clear, both from the English Statutes made of force, and from our own, that the sole object of bringing these establishments under the supervision of the civil authority, was to limit and repress, as far as practicable, the evils resulting from the use of intoxicating liquors. I do not understand that a boarding house, such as is found in any town or village, or that the houses on all the great highways, where travellers are entertained with meat, drink and lodging, are required to be licensed. (12 Mod. 254.) These are, in some senses, inns and taverns, and the owners are entitled to some of the privileges, and subject to some of the liabilities, of such employment; but they are not the kind of inns and taverns that come within the spirit and purview of the license law. Such, I believe to have been the universal understanding of the law upon this subject; and, in no instance that I have known, or heard of has a license been taken out for any house of entertainment, except those in which wines and liquors were sold independent of, and unconnected with eating and lodging. The construction here put on our license law is in perfect consistency with the Act of 1816, "the more effectually to prevent the pernicious practice of gaming," and the Act of 1835, to "amend the law in relation to granting licenses to retail spirituous liquors;" and, so far as I can learn, it has been the uniform construction of the boards of commissioners of roads. They have always granted but two kinds of licenses, one called a retailer's, and the other, a tavern license. Until within a few years, the commissioners generally granted tavern licenses to every shop keeper who

would give the bond required by law, to keep clean and wholesome meat, drink and lodging for travellers; and this pernicious practice, in some of the districts, is continued up to this time, although there is no pretence that such persons keep a tavern in the proper sense of the term.

From what has been already said, we may fairly infer, 1st. that to keep a house for the entertainment of travellers, or boarders, requires no license; 2d. that if, to such entertainment, be added the vending of spirits in small quantities, as is usually done at the bar of a tavern, then a license is necessary; 3d. that a licensed retailer, who does not keep a tavern, cannot sell under a quart; and, 4th. that tavern licenses are as much under the controul of the commissioners of roads as the licenses to retail.

Contrary to my usual habit, I have gone into much detail in the examination of this case. I have done so, not because there is any intrinsic difficulty in the subject, but because of the deep and exciting interest of the questions supposed to be connected with it. As a judge, it is my duty to expound, not to make, the law, *dicere et non facere legem*; but, on this occasion, I have the consolation to know that there is nothing new in this opinion, nor any thing which will interfere with that great reformation in the habits of our people, which has already taken place.

It is the opinion of this court, that there was error in the charge of the circuit court, and a new trial is, therefore, ordered.

RICHARDSON, EARLE and BUTLER, JJ. concurred.

O'NEALL, J. in a case turning on the same point, delivered the following elaborate judgment, which may be appropriately regarded as his Honour's dissenting opinion.

"Commissioners of Roads vs. James H. Dennis. Summary Process. Sumter, Spring Term, 1840."

"The defendant obtained a license to keep a tavern. The commissioners, supposing they were entitled to demand \$50 for such license, as including a license to retail, have brought this process to recover it.

"I have given the subject as deliberate a consideration as my situation will permit ; and, notwithstanding the great respect which I have for the legal judgment of those who entertain the opinion that a license to keep a tavern includes a license to retail, I am constrained to say, that I regard the tavern license and the license to retail, as two distinct things.

"The oldest law to which I have had reference, is that of 5 and 6 Ed. 6, c. 25, (App. P. L. 24,) which, as its title purports, was "for keepers of ale houses and tippling houses to be bound by recognizance." After reciting the grievance, (which, unfortunately, still exists,) that "intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase through *such abuses and disorders* as are had and used in common ale houses and other houses called tippling houses," this law enacted that the justices of the peace shall have "full power and authority to remove, discharge and put away common selling of ale and beer in the said common ale houses and tippling houses, *when they shall think meet and convenient.*" It then provides that no one shall be allowed to keep such houses except such as shall be admitted in the sessions, or by two justices of the peace, whereof one shall be of the quorum, who are directed to take bond and security by recognizance, against gaming, and for the maintainance of good order. This Act, passed by the British Parliament in 1522, is the fountain from which is derived the power of the commissioners of roads to grant licenses to retail. It may be remarked that its provisions are wholly applicable to ale

houses and tippling houses; which are but other names for our retail shops, now commonly called groggeries. Nothing is said about a tavern. In this Act, too, it will be remarked that the justices have, explicitly, the power to remove, discharge and put away the common selling of ale and beer in the said common ale houses, when they shall think meet and convenient. This power, on examining the subsequent legislation, extended to every species of retailing, appears to be continued to the commissioners of roads.

"The stat. 1 J. 1, c. 9, (App. P. L. 25,) to restrain "the inordinate haunting and tippling in inns, ale houses and other victualling houses," makes no mention of, or provision for, tippling houses, provided for in 5 and 6 Ed. 6, c. 25. The recitation of the preamble of that statute gives the true notion of the places which it purports to regulate, and shews that retailing does not appropriately belong to them. It states that "the ancient, true and principal use of inns, ale houses and victualling houses, was for the receipt, relief, and lodging of wayfaring people, travelling from place to place, and for such supply of such people as are not able to buy greater quantities, to make their provision of victuals, and *not meant for entertainment and harbouring of lewd and idle people, to spend and to consume their money and time in lewd and drunken manner.*" The latter clause of the recitation, denying that ale houses and victualling houses were intended to be devoted to drunken purposes, is a most graphic description of the proper use of a retail shop at the present day.

"The stat. 4 J. 1, c. 5, (1 App. P. L. 25,) "for repressing *the odious and loathsome sin of drunkenness,*" relates to inns, victualling houses, or ale houses. The same may be remarked of stat. 2 J. 1, c. 7, and stat. 1 C. 1, c. 4. These statutes clearly shew that an inn, which is now commonly called a tavern, was, in the understanding of our ancient lawgivers, a very different thing from a modern retail shop.

"The Act of 1784, (P. L. 340,) empowered (outside

of St. Philip's and St. Michael's,) any two or more magistrates, for the respective districts of the State, to grant certificates to any person or persons who may apply for the same, if in their judgment they shall think such person or persons "fit and qualified to keep a tavern, inn, ordinary, punch, ale house or billiard table, *or to retail strong liquors.*" A certificate for one of the different establishments here described, would not, *ex vi termini*, include another. For example; a certificate to keep a tavern would not authorize the keeping of a billiard table. I should think, on the plain words of the Act, that a certificate to keep a tavern would not authorize the retailing of strong liquors; for this last is separated from the former, not only by one, but by two disjunctive conjunctions, shewing that it was not regarded as identical with any of the other matters provided for. It is true, the same sum was to be paid for each; but, surely, the legislature were competent to make a distinction in this behalf whenever afterwards they thought proper so to do.

"The county court Act of 1785, (P. L. 384,) gave to the justices of the county court the power to hear "in open court all applications for licenses to keep taverns, or public houses, within their respective counties, and *to reject* such application, or grant such license, for one year, *as to them shall seem meet.*" In this Act, the use of the word 'public houses' might give great plausibility to the idea that a tavern license was a license to retail, were it not for the Act of 1788, (P. L. 454,) which shews that it was not supposed that the county courts had, by the Act of '85, power to grant licenses to retail. It is therein provided, that the "authority and superintendence of the county courts over taverns and tavern keepers, shall extend to all persons who shall retail, within the jurisdiction of any county court, any wine, brandy, rum, gin, beer, cider, punch, or other spirituous liquors or strong drink, *in quantities less than three gallons.*" That Act probably made a tavern license equivalent to a license to retail; but it

shews, nevertheless, that they had, before, been distinct. The Act of 1791, (1 Faust, 50,) however, again separated them; for it provided that the county courts should have power to grant licenses for retailing of spirituous liquors or keeping of taverns."

"The Act of 1799, (2 Faust, 325,) standing by itself, might shew that a tavern license would include a retailer's license; for it gives the commissioners of roads "full power and authority to order licenses to be granted to proper persons to keep taverns and retail spirituous liquors." But this Act, when read in connection with the Act of 1791, must, notwithstanding the loose wording of it, be held to mean no more than that the commissioners of roads should have the power, heretofore belonging to the county courts, of granting licenses to tavern keepers, and to retailers.

"The Act of 1825, (p. 57,) which was a collection of all the laws in relation to the powers and duties of the commissioners of roads, of force in the State, and a re-enactment of the same, provided that "the sole and exclusive power of granting licenses to retailers of spirituous liquors, tavern keepers, and keepers of billiard tables, shall be, and the same is hereby, vested in the commissioners of roads." In this Act, it is plain that three classes to be licensed are contemplated; 1st. retailers, 2d. tavern keepers, and, 3d. keepers of billiard tables. It is plain that a license for one would not be a license for all these pursuits.

"The Act of 1835, (p. 75,) has entirely separated retailing from the keeping of a tavern; for it is, by it, made a subject of distinct legislation, and the retailer is subjected, by name, to restrictions and conditions which do not apply to tavern keepers. The price of a license to retail spirituous liquors is fixed at \$50; but no provision is made for a tavern keeper's license to be changed, either in its nature, or in the price to be paid for it. It must therefore, stand as it did before.

"The decree must be for the defendant."

GANTT, J. I concur with the presiding judge, O'NEALL, in the views taken of the law as expressed in his report, and I trust that the Legislature will soon interpose its high authority to do away the impolitic and mischievous amalgamation; that travellers may rest in quiet and peace at those houses, founded on principles of public expediency; which will not be the case, if riot and disorder is permitted to prevail.

Cozens & Brothers vs. Daniel House.

On the joint and several note of a man and his wife, a writ was issued against both, as separate persons. It seems that the declaration against husband alone, suggesting the relation of the parties, would have been good; but, for want of such suggestion, it was bad on special demurrer.

Quere, whether, on special demurrer, such variance would defeat the action, or only put the plaintiff to amend.

Such variance is not the subject of a motion for non-suit after plea; for the plea has denied the declaration without reference to the writ.

Before BUTLER, J. at Columbia, March Extra Term, 1840.

Action on a joint and several note made by the defendant and his wife. The writ was against both; the declaration, against the husband alone. Defendant moved for a non-suit, which was overruled; and plaintiff took judgment against the husband.

Defendant renewed his motion in the court of appeals, on the ground that the plaintiff had sued on a joint contract, whereas the note offered in evidence was the separate note of Daniel House; the signature of the wife being a nullity:

Curia, per BUTLER, J. By our law, according to approved

decisions, the writ may be referred to as a part of the record, and hence, the declaration should conform to and be consistent with it. A material variance between them would be fatal to the action. As a general rule, the declaration should retain the names and the relation of the parties, as they are stated in the writ. But there are cases where the name of a party may be dropped from the declaration, that had been included in the writ; as in *Caldwell vs. Harp*, (2 M'C. R. 275,) where the plaintiff had brought an action against two, on a joint and several demand, and had declared against one. By looking at the writ, it appeared that but one of the parties had been served, so that but one, in fact, was sued. In such case, it was held that the plaintiff might discontinue as to one and proceed against the other, without making different parts of the record inconsistent. If it had appeared, in the case under consideration, either by the writ, or by suggestion in the declaration, that the defendants were husband and wife, the declaration against the husband alone would have been good; because the record would have explained itself. This, however, does not appear, and there is a departure, in the declaration, from the writ.

It is unnecessary for us to say what would have been the precise legal effect of the variance, if it had been properly taken advantage of. There is no doubt that advantage of it could have been taken by special demurrer. (*Young vs. Gray*, 1 M'C. R. 201.) This might not have defeated the action; but only have arrested it, so as to enable the plaintiff to amend his proceedings. We think the defendant was properly denied the right of excepting to the defect, on a motion for a non-suit, after having pleaded to the declaration; for the plea denied the defendant's liability according to the allegations of the declaration, without reference to the writ.

Motion dismissed; GANTT, EVANS and EARLE, JJ. concurring.

DeSaussure for the motion; *Black & Arthur*, contra.

*The State at the relation of James R. Lark and others vs.
J. R. Cureton.*

A Justice of the Peace has no authority to issue a writ of *capias ad satisfaciendum*.

Before RICHARDSON, J. *at Lancaster.*

A justice of the peace had issued a writ of *capias ad satisfaciendum*, on a judgment awarded by himself; and the judge below granted a prohibition to restrain the execution. The plaintiff moved the court of appeals to reverse that decision.

Curia, per EARLE, J. The office of justice of the peace was unknown to the common law. It was created in England by statute, and the appointment is by the King's commission, which defines the extent of his power and authority. The duties of the office were mainly ministerial, and related to the preservation of the peace and the prosecution of offenders. Recent statutes, there, have enlarged the jurisdiction to many classes of cases foreign to the original institution. Here, the office, at an early period, underwent a more important change; and, from being ministerial, became judicial also, to a much greater extent than in England. The first Act for the trial of small and mean causes, was passed in 1686, giving jurisdiction to a justice of the peace, to the amount of 40 shillings. Similar Acts were passed in 1687, 1690 and 1692, all limited in their duration to short periods. This last was several times continued, and, finally, made perpetual by the Act of 1712. This Act of 1692, authorized the justice, after hearing the parties and their witnesses, to adjudge and determine, according to justice and equity, to cause execution to be levied of the goods and chattels of the defendant, and, for want of these, to take the body. But the Act of 1747, which repealed all previous Acts for the trial of small and mean causes, at the same time that it enlarged the jurisdiction of a justice to all cases where the debt or damages

do not exceed £20 current money, and rendered it exclusive within that amount, gave him only the power of awarding execution against the goods and chattels; and the 5th section provides expressly that "no writ of *capias ad satisfaciendum*, or execution against the body of the defendant, shall be hereafter issued out of any court in this Province, for any debt or damages under £20 current money, debts due to his Majesty excepted." The subsequent Acts, enlarging the jurisdiction of justices, first to three pounds, then to five pounds, then limiting it to 20 dollars, relate to the trial, and not to the mode of enforcing judgment. Indeed the Act of 1799 limits the jurisdiction to 20 dollars, "to be recovered by the same proceedings as have heretofore been used, on the trial of causes small and mean;" and the mode of proceeding, under the Act of 1747, had been an execution against the goods only. The Act of 1824 has no other effect than to render the jurisdiction exclusive to that amount. The Act of 1747 still regulates all trials before justices for the recovery of demands within their jurisdiction; and, by that, they have no power to award execution against the body.

The motion is refused.

GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurred,

Williams for the motion.

Francina Prather vs. Robert Owens,

"Unto and into a certain highway which runs near where the said plaintiff resides," is a sufficient description of the *terminus ad quem* in a declaration in case for obstruction of a private way; at any rate it is good after verdict.

In an action on the case for obstruction of a private way, a verdict of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it in a subsequent action between the same parties.

Before EARLE, J. at Laurens, Spring Term, 1840.

Action on the case for obstructing a private way. Plea, not guilty.

The plaintiff had had a verdict against the defendant in a previous action, for the same obstruction, with five dollars damages; and, in a second action, had taken a similar verdict by consent. The obstruction not being yet removed, this third suit was brought; the witnesses to establish the right and the infringement of it, being the same as in the former cases.

The court held that the former verdict was conclusive of the right, and the only questions were the continuance of the obstruction and the amount of damage. The jury, so instructed, found for the plaintiff \$150.

The defendant moved the court of appeals for a new trial, for error in the charge of the circuit judge; and in arrest of judgment, because the verdict did not specify the way to which the defendant was entitled, and because it was not set out with sufficient certainty in the declaration.

Curia, per EARLE, J. The plaintiff declares upon her possession, and claims a right of way from her plantation "into, through and over the plantation and close adjoining thereto, now in the possession of the defendant, unto and into a certain highway, which runs near where the said plaintiff resides." It is suggested, in arrest of judgment, that the way is not set out with sufficient certainty. It is true that the *termini* of a way should be set out with reasonable certainty; and a majority of the court are of opinion that "unto and into a certain highway which runs near the residence of the plaintiff," is a sufficient description of the *terminus ad quem*. The precedent is taken from 2 Chitty Plead. 361, (p. 809 of Ed. 1837,) where the description is, "unto and into a

certain common and public highway in the county aforesaid," and refers to *Blockley vs. Slater*, (1 Lutw. 119;) and it is added, in note *t*, "the *terminus ad quem* may be laid to be a public highway, and will be proved by evidence of a public footway." In *Allen vs. Ormond*, (8 East. R. 4,) the way claimed was from the plaintiff's gardens "unto, into, over and across the close called Crannels, unto and into a certain public King's highway, in the parish aforesaid;" and it was objected, that the *terminus ad quem*, being a public highway, must be taken to be a highway for all purposes, and was not proved by evidence of a common footway. But the objection was overruled, and the plaintiff had a verdict, which was sustained, because it was a public highway for foot passengers; though the court expressed a doubt, whether the description might not have been bad on special demurrer, as not pointing out with sufficient certainty what sort of highway was meant; that is, whether for carriages, for persons on horse back, or for foot passengers. It was not made a question whether the *termini* of the highway should be described, (as into a certain highway leading from such a place to such a place,) as it is argued here. We have, strictly speaking, but one kind of public highway, which is a highway for all purposes, and, in pleading, must be so intended. The doubt expressed by the court, in *Allen vs. Ormond*, would not apply to cases arising here.

We are all of opinion that any error in omitting the *termini* of the way claimed, is cured by verdict. It was so held in *Clarke vs. Cheney*, (1 Ventr. 13.)

It is objected that the verdict does not specify the way to which the plaintiff is entitled. The verdict is in the only form in which a verdict can be rendered, a verdict for damages, which establishes the plaintiffs right to the way described in the declaration. The jury could not render a verdict which should have the effect of putting the plaintiff in possession of the way, as in ejectment, or trespass to try title;

for it is an incorporeal right, an easement over the land of another, and the plaintiff could only recover damages for the obstruction, which he may continue to recover as long as the obstruction remains.

On the grounds taken for a new trial, the court are of opinion, that there was no error in the instruction to the jury. There is certainly a difference made, in some leading cases, between the effect of a former recovery when pleaded, and when given in evidence. But all these cases have arisen upon the effect of a former recovery when offered by the defendant; and it is said that the plaintiff shall not be estopped, unless the former recovery be specially pleaded. If the defendant, on the general issue, put the plaintiff upon proof of his case, and use the record of former recovery only as evidence, the jury shall not be precluded from saying that the plaintiff had a cause of action, notwithstanding. (*Outram vs. Morewood*, 3 East. R. 345; *Vooght vs. Winch*, 2 B. & A. 662.) In the Dutchess of Kingston's case, Ch. J. De Grey, in delivering his judgment, holds the following language: "From a variety of cases, relative to judgments being given in evidence in civil suits, it seems to follow, as generally true, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another court." If this be true, it is impossible to imagine a reason why a judgment rendered in the same court should not be equally conclusive. In *assumpsit*, a former recovery may be either pleaded in bar, or given in evidence; and there seems to be no good reason why, in one case, it should be absolutely conclusive, as a bar, or an estoppel, and, in the other, should only be persuading evidence, as it is called. A record of conviction against a parish, for not repairing, is conclusive evidence, on a subsequent indictment against the same parish, of the liability of the parish to repair. (*Peake's Cases*, 219.) In an action for

mesne profits, the judgment in ejectment is conclusive against the defendant, on the right of possession at the time of the demise. (6 Brev. 666.) From these cases, it would seem to be entirely in conformity with the principle on which they have been decided, that the former verdicts for the plaintiff against the defendant, for an obstruction to the same way, should be regarded as conclusive evidence of the right of the plaintiff to the way in question. In this action, it was impossible for him to plead the former recovery as an estoppel; he could only set out the way and the obstruction. The recovery was not conclusive on all the points made on the new issue; for the continuance of the obstruction was a fact to be made out by additional proof, and he used the former record in the only way in which he could use it, as evidence of his right. The old maxim, that no man shall be twice vexed by the agitation of the same question, would seem to be of very little authority, if, after two verdicts on the same right, in dispute with the same adversary, supported by the same proof, out of the mouths of the same witnesses, the plaintiff should be told that the verdicts have concluded nothing, and that the right is still an open question. The case of *Street vs. Bovingdon et al.*, (5 Esp. 56,) is directly in point. It was twice tried before Lord Ellenborough, who decided *Outram vs. Morewood*, and occurred immediately after that case. It was an action on the case against the defendants, for erecting weirs and other obstructions in a certain river, and thereby directing the water from the plaintiff's mills. The plaintiff offered in evidence the record of a former action against Bovingdon alone, for similar wrongs, in which he had relied on the same rights which he claimed in the subsequent action, and had obtained a verdict. The plaintiff's counsel contended that the verdict was conclusive of the plaintiff's right; which was resisted by the other side. Lord Ellenborough said, "the record of the former case could not be deemed a legal estoppel; but it was binding so far, that he should think

himself bound to tell the jury to consider it conclusive of the rights of the parties." Upon which the defendant's counsel, Best, *serjeant* and Espinasse, acquiesced, consented to a verdict for the plaintiff, and agreed to remove the obstructions. The defendant, here, offered the same proof, by the same witnesses, to resist the plaintiff's right, as on the former trial; and the jury were properly instructed that, as matter of evidence, the former verdicts ought to be considered as conclusive of the right of the plaintiff; leaving the other questions to depend on the additional proof.

Motions dismissed; GANTT, RICHARDSON, EVANS and BUTLER, JJ. concurring.

Irby for the motion; *Young*, contra.

William Cavan and others vs. Robert W. Dunlap.

Application for relief under the prison bounds Act, being resisted on the grounds that defendant's schedule was false, and that an assignment (mentioned in the schedule) of part of his effects, was false and fraudulent; the jury found the *assignment* false and fraudulent. *Held* that this was not such conviction of rendering a *false schedule*, as thereafter to exclude the defendant from the benefit of that Act and the insolvent debtor's Act.

But the defendant was not entitled to his discharge 'till that action, in which the verdict of fraudulent assignment had been found, was satisfied.

Three months advertisement in a newspaper was sufficient notice, to suing creditors generally, of an application for the benefit of the insolvent debtor's Act.

One of the plaintiffs, a suing creditor, resisting the application for the benefit of the prison bounds Act, was not a competent witness for the other plaintiffs, to prove that the defendant's schedule was false.

Before O'NEALL, J. at Camden, Spring Term, 1840.

In this case, the defendant had applied for the benefit of the insolvent debtor's Act. The plaintiffs, suing creditors,

filed their suggestion. objecting to the defendant's discharge, and setting out for cause, amongst other things, that the defendant, in confinement at a former suit of N. B. Arrants, (one of the present plaintiffs,) had, on application for the benefit of the prison bounds Act, been convicted of having rendered a false and fraudulent schedule, and that he thereby forfeited his right to relief under the insolvent debtor's Act.

The facts were, that the defendant's application, at the suit of Arrants, had been resisted on the grounds that his schedule was false, and an assignment of part of his effects to one James J. Dunlap, fraudulent. The articles assigned were contained in the schedule, and specifically designated, with a memorandum of the assignment at the foot. On the issue then presented, the verdict was, "we find the assignment false and fraudulent, and should be void."*

The plaintiffs, in the present case, contended that the defendant was brought, by this verdict, within the disability created by sec. 10 of the prison bounds Act, (P. L. 456,) viz. "that any person who shall deliver in a *false schedule* of his effects, shall suffer the penalties of wilful perjury, shall be liable to be arrested again for the action, or execution on which he was discharged, and shall be forever disabled to take any benefit from this Act, and from the Act for the more effectual relief of insolvent debtors, passed the 7th day of April, 1759." But the court held that the verdict, only finding the *assignment* false and fraudulent, did not subject the defendant to the penalty attached to the rendering of a false schedule.

After the case had been partially heard, it was objected by the plaintiffs, that Levy & Hughson and Farrar & Robinson, suing creditors, had had no notice of defendant's application. (P. L. 247.) It appeared that a notice had been published for three months, in the Camden Journal, for the plaintiffs

* In the report of *Arrants vs. Dunlap*, (*supra*. p. 27,) it is inaccurately stated that the jury found the *schedule* false and fraudulent. The error, however, was not material to the issue there involved.—R.

named, *and all other suing creditors*, to appear at the court of common pleas, to be holden for Kershaw district on the fourth Monday in March next, to shew cause, if any they can, why the prisoner [the defendant] should not be discharged under the insolvent debtor's Act. The court decided that this notice was sufficient.

To prove the defendant's schedule false, William Cavan, one of the plaintiffs in this suggestion, (and one at whose suit the defendant was confined,) was offered as a witness. But the court excluded him as incompetent, both because he was a party on the record, and because, as a suing creditor, he was directly interested in the event of this issue.

On the other objections, the jury found for the defendant, and he was discharged on taking the oath and making the assignment required by law.

The plaintiffs moved to set aside the verdict and order for the discharge of the defendant, and to grant a new trial, on the following grounds:

1. That, by the verdict, at the suit of Arrants, the defendant stood convicted of rendering a false schedule, and was thereby excluded from any benefit from his present application.

2. That the defendant was not entitled to any benefit under the insolvent debtor's Act, so far as respects the case of N. B. Arrants against him, inasmuch as that case was *res adjudicata*.

3. That no legal notice had been given to Levy & Hughson, and to Farrar & Robinson.

4. That the evidence of William Cavan had been improperly excluded.

Curia, per EARLE, J. The principal question which we have to decide, arises out of the first ground of the defendant's motion, and depends on the construction of the verdict rendered by the jury on the first issue. If we are to construe

the verdict according to the meaning and intention of the jury, (if there be any thing equivocal in its terms,) we must see what questions they were called on to decide. Every verdict must conform to the issue ; and this verdict, on a former occasion, in *Arrants vs. Dunlap*, decided here last term, was held to cover the issues, or one of the issues, and therefore not to be immaterial and irrelevant. Five grounds of objection were taken to the defendant's discharge, when arrested at the suit of Arrants, and without reciting them, it may be confidently stated that they presented but two charges, variously modified. The first and fifth alledged that the schedule was fraudulent and false in this, that it did not contain all the effects of the defendant, but had omitted sundry articles of property enumerated, and particularly, large sums of money. The second alleged the schedule to be fraudulent and false in this, that it subjected the assets to a certain assignment, which was fraudulent, and the debts to be secured by it, pretensive and unfounded. The third was, that the defendant had fraudulently transferred and delivered his property to J. J. Dunlap, under the said fraudulent assignment, to defeat his creditors. And the fourth was, that he had given an undue preference to one creditor to the prejudice of the plaintiff. His Honour, Mr. Justice O'NEALL, therefore correctly stated the accusation to be, 1st. That the schedule was false ; 2d. That the assignment made to J. J. Dunlap, was fraudulent. Upon those questions issue was taken, and the jury rendered the following verdict. " We find the assignment to be false and fraudulent, and should be void."

I cannot perceive the force of the reasoning, by which this verdict is made to convict the defendant of having rendered a false schedule. There is no pretence that it was false, for having omitted any portion of his estate or effects. It seems to be admitted that every thing was included ; and the argument is, that it was a false schedule, because it subjected the effects to an assignment which was fraudulent. What is

meant by "a schedule, on oath, of his or her whole estate," is, that it shall contain a true account and statement of all the property of the defendant, or to which he had any just claim, subject, of course, to all prior liens or incumbrances; and the "false schedule" in the 10th section, is one which omits a portion of the property. It is not rendered a false schedule because it may specify liens which are even pretended or fraudulent; much less so, if the assignment to which it may subject the effects, be for a debt really due, although the assignment may be void, as an undue preference of one creditor to another. Now the assignment in this case may have been fraudulent and void, although there may have been a just debt due to James J. Dunlap.

The construction contended for by the actors on this motion, would abolish all distinction between three classes of cases provided for in the 7th section; 1st. Making a false return; 2d. Having preferred one creditor to another; 3d. Having fraudulently sold, conveyed or assigned the estate to defraud creditors. By the 10th section, it is only a conviction of the first which would deprive the petitioner of the benefit of the Act then, or afterwards; and the provision itself, by the force of its own express terms, implies and supposes that there may be cases of fraudulent preference of creditors, or fraudulent assignment to one who is not a creditor, which would not come within the meaning of that section. Now, the verdict in question is obviously framed to meet the allegation of the plaintiff, that the assignment to J. J. Dunlap, was fraudulent; and not that the schedule was false. If the plaintiff had desired it, the jury might have been required to find on the other issues; or, if there was any ambiguity in the verdict, they might have been required to amend it. But if he acquiesced in it, as sufficient for his purpose, to prevent the discharge of the defendant without paying his debt, (which was the legal effect,) he cannot, or rather others cannot now come in and claim to give it a more comprehensive effect.

The use of the word 'assignment,' would alone be sufficient to point the finding to the issue made on that subject; and when they add "and should be void," no doubt, I think, remains that such was the intention of the jury, for it would be senseless to speak of a schedule being void. The defendant, by rendering a schedule which contained a true statement of all his visible effects and choses in action, or of such as he had owned, although subject to the claim of J. J. Dunlap under the assignment, cannot be deprived of the benefit of the insolvent debtor's law in other cases, because the jury have said the assignment was fraudulent. Admitting that the verdict is equivocal in its terms; the very fact that the intention of the jury is uncertain, that we do not know that they meant to convict the defendant of having rendered a false schedule, and that they have clearly found the assignment to be fraudulent on the other issue, which was sufficient for the plaintiffs purpose on that proceeding, should decide the present question, and induce us to construe the verdict so as to give it only that effect; especially when we consider that a different construction will have the effect of subjecting the defendant to lasting confinement.

On the second ground of the motion, we are all of opinion, that so far as regards the case of Arrants, the defendant was not entitled to his discharge. He was convicted, by the verdict in that case, of having made a fraudulent assignment to the prejudice of his creditors; and his case does come expressly within the second clause of the 7th section of the prison bounds Act, "nor shall *any* prisoner be discharged without fully satisfying the *action* or execution on which he is confined, if" [among other things] "he shall have fraudulently sold, conveyed or assigned his estate, to defraud his creditors." The words *any prisoner* in connection with the word *action*, as distinguished from *execution*, together with the whole scope of the Act, to provide for persons confined either on mesne process, or on execution, demonstrates that

the opinion of the court in the case of *McClure & Mims vs. Vernon*, (2 Hill 433,) was formed on a hasty examination and comparison of the different sections; and that the principal enactments, both of the 4th and 7th sections, relate to both classes of prisoners. If there were any doubt, it would be removed by the Act of 1833, as remarked by Mr. J. BUTLER, in *Arrants vs. Dunlap*. The defendant, under that verdict, was not entitled to be discharged, without fully satisfying the action on which he was confined. And we think the court below decided erroneously on that point.

The third ground being obviated, or abandoned, it remains only to remark on the fourth, that William Cavan, the witness proposed to be sworn, was one of those who resisted the defendant's discharge. He was one of the plaintiffs on the issue; he was necessarily to be benefitted by any verdict, which would have the effect to retain the defendant in confinement until his debt was paid; and he could not testify without affecting his own interest. This court concurs with the circuit court on that point.

A majority of the court are of opinion, that the defendant was entitled to be discharged from all the actions or executions, by virtue of which he was confined, except that of *Arrants*, in relation to which, the motion to reverse the circuit decision is granted. In regard to all the others, the motion is refused.

GANTT, RICHARDSON and EVANS, JJ. concurred.

BUTLER, J. *dissenting*. As I think, by the terms of the verdict, in the case of *Arrants vs. Dunlap*, the defendant was convicted of having rendered a *false* and fraudulent schedule, I dissent from the judgment of a majority of my brethren. The finding of the jury was, that the assignment by R. W. Dunlap to his brother, J. J. Dunlap, *was false* and fraudulent, *and void*; which, fairly interpreted, means that J. J. Dunlap was not a creditor, entitled to the property assigned to him;

but that it was the property of defendant, and should have been returned as such ; that is, the defendant had returned property as belonging to another, which belonged to himself, and had sworn to it. The statement in the schedule was not true, although it was so represented by a false oath ; and it is said this is not a false schedule. I suppose the schedule would have been regarded false, if the defendant had omitted to insert any piece of property in it ; or had he stated that he had a limited interest in a piece of property, when he was the absolute owner ; or had he concealed the true character of property, which he represented as worthless ; as, that property was in Texas, which he had in his own possession, and which he could immediately take into his own charge and subject to his dominion and enjoyment : in such cases, I take it, the schedule would be both deceptive and false. Fraudulent concealment and false representation may render a schedule false, as well as ignorant or wilful omission. It would be not the less false because it was disguised by crafty contrivance and fraudulent combination with another. In making a fraudulent conveyance, to defraud creditors, a man may also make thereby a false return, or schedule of his property. Not that every conveyance to defraud creditors would be false ; for one might make a voluntary conveyance, or one on grossly inadequate consideration, to defraud creditors, and yet render a true return of his property ; but when the conveyance is pretensive, and is intended to secure the property to the defendant himself, either directly or indirectly, it is no conveyance at all, except that it is on paper, and not verbal. Suppose it should appear, hereafter, that the property assigned by defendant had been re-delivered to him by a previous agreement, could his successful fraud exempt him from the operation of the 4th clause of the statute ?

It seems to me, the jury have said what they intended to say, that the property, represented in the schedule, as belonging to J. J. Dunlap, belonged to R. W. Dunlap himself, and

should have been returned in his schedule, as liable to the demands of his just creditors.

Every unfortunate debtor should have extended to him, with alacrity and promptness, the benignant provisions of the insolvent debtor's laws; but one who has committed a fraud supported by a false oath, should be subjected to their proscriptive justice. I do not undertake to say that the defendant was guilty of fraud and falsehood; but I do say, the jury have convicted him of them, by the terms of their verdict, when construed in reference to the subject matter submitted to them.

Withers & J. M. DeSaussure for the motion; *Smart*, contra.

B. Bagwell vs. J. Jamison.

Quere, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants entitled to rent may give special matter in evidence under the general issue.

In trespass against a bailiff, for levying under a distress warrant alledged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgements by the landlord, (deceased,) of partial satisfaction, were admitted in reply.

Levy, under a distress warrant, some months after the death of the landlord who had issued it, was a trespass; for the warrant was but a power of attorney, which expired *eo instanti* with the principal's death.

Executors and administrators may not distrain for rent due at the death of their testator or intestate. The stat. 32 Hen. 8, c. 37, to the contrary, not of force here.

The acquiescence, in a trespass, of one who has been deceived by a pretence of legal authority, is not such consent as to affect his remedy at law.

Trespass *vi et armis* is the proper remedy for a levy under a warrant avoided by the landlord's death, or under a pretence of authority in his administrator.

Before EARLE, J. at Laurens, Spring Term, 1840.

Trespass vi et armis, for taking certain household chattels, &c. The taking, in September, 1838, was proved, and a subsequent sale by the defendant, to the amount of about \$150.

On the general issue, the defendant was permitted by the plaintiff to justify. He relied on a distress warrant issued by one Kingman on the 26th April, 1838, for \$110, claimed as rent for 1837. Soon after issuing this warrant, Kingman died, and the subsequent proceeding was under the authority, or by the direction of Squire Colhoun, the administrator of Kingman, who was present on the occasion of the levy. The advertisement of the sale was signed by Colhoun, and bore date the 12th September, 1838. The defendant relied, also, on the plaintiff's acknowledgement that rent was due, and on his not resisting the levy, or forbidding the sale, but expressing his anxiety that the rent should be paid.

The evidence on the question of rent in arrear was uncertain, and consisted entirely in admissions of the plaintiff. In reply to which, (there being no actual demise shewn, nor any evidence in writing, or by parol, of the duration of the term, or of the amount of rent reserved, or when payable,) the court permitted the admissions of Kingman to be proved, that he had received near three bags of cotton in the fall of 1837, in payment of rent. Such admissions, the presiding Judge observed, he apprehended were competent under any circumstances. The warrant was the act of the landlord only, and, to afford a legal justification to his bailiff, it should have been made to appear that the landlord had authority to issue it at the time, and for the amount specified.

But, expressly waiving that point, his Honour put the case to the jury on the single ground that the death of the landlord, after granting the warrant to the defendant, and five or

six months before any proceeding was instituted under it, was a revocation, in law, of the authority; and that the administrator could not, afterwards, enforce the distress by levy and sale.

On the principle of *volenti non fit injuria*, the jury were instructed that the plaintiff might have waived the trespass by assent; but not, if his submission arose from the impression that he could not resist what he was led to believe was a legal process.

Verdict for the plaintiff, \$300.

The defendant moved the court of appeals for a non-suit, because the action for the injury alleged should have been *case* and not *trespass*.

And for a new trial on the following grounds:

That the declarations of Kingman had been improperly admitted:

That his Honour erred in charging that the warrant was void, notwithstanding the plaintiff had consented to the levy and sale.

Curia, per EARLE, J. The general rule of pleading in actions of trespass, at common law, is that, whenever the act complained of would, *prima facie*, appear to be a trespass, any matter of justification, or excuse, such as a warrant, or other authority, must be specially pleaded. The statute 11 Geo. 2, c. 19. provides that, in actions against persons entitled to rent, they may plead the general issue, and give the special matter in evidence. That statute has not been made of force in this State; although in *Pemble vs. Clifford*, (2 M'Cord R. 31,) the court says that it "has been adopted in practice, and, as a usage, has become obligatory on us." There are other important provisions in that statute, which I am not prepared to say that I should consider part of the statute law here; and how far it is to be considered of force, I shall reserve my opinion, until some question shall specially arise.

The defendant, in the case under consideration, relied for his justification on the warrant of distress issued by Kingman on 26th April, 1838. As it was only the private act of the landlord, it had none of the force of a judgment, or execution, so as to be conclusive evidence of rent in arrear; and it was necessary to prove, in some way, that rent was due. The acknowledgements of the plaintiff were competent for that purpose, and if sufficiently explicit and certain, might have established both the tenancy and the amount of rent due. If they were competent for that purpose, surely the admissions of the landlord, who gave the warrant, and for whose benefit the distress was made, were equally admissible to shew that the rent had been paid, either in the whole or in part. Such admissions do not come within the rule of hearsay evidence, and are not rendered competent in consequence of the death of the landlord: they are competent as the admissions of the principal party in interest.

A warrant of distress is nothing but a power of attorney. The bailiff, or other person executing the warrant, is only the agent of the landlord. And the power, both in regard to the extent of the authority and its duration, is to be construed according to the law of principal and agent, except where regulated by statute. It is the general and settled doctrine, that the authority of an agent determines by the death of his principal, which is an absolute and instantaneous revocation of the authority of the agent, unless the power be coupled with an interest. (2 Kent. Com. 646.) No valid act can be done in the name of a dead man.

The defendant, having exhibited the warrant as his justification, ought perhaps to be held to it, in the same manner as if he had pleaded it specially. But his defence, in the argument here, has been put, in part, upon the ground that Colhoun, the administrator of Kingman, by whose order the distress was made, was himself personally present, and, therefore, that it was a lawful distress, without the warrant. At

common law, neither the heirs, executors, nor administrators of a man seised and entitled to rents, had any remedy for the arrearages incurred in the lifetime of the owner of such rents. (Co. Lit. 162, *a*.) For remedy whereof the stat. 32 Hen. 8, c. 37, provided that the executors and administrators might distrain for rents due their testator or intestate, at the time of the death, upon the land charged with the rent; and a later statute, in England, in the time of William IV, has been found necessary further to extend this right of the representatives of a deceased landlord. But the stat. of 32 H. 8, has never been made of force here, either expressly by the Legislature, or by necessary implication; nor am I aware of any judicial decision by which it has been held to be of force, as other English statutes have been, especially on the subject of rent; and sometimes, perhaps, without sufficient reason. The remedy by distress is a rigorous proceeding, often harsh in its operation, not congenial to the spirit of our institutions and government, and not to be extended beyond the clear and settled limits, except by express enactments of the Legislature.

That the plaintiff might waive the want of legal authority to distrain, and might assent to the taking and sale of his goods, so as to prevent him from maintaining trespass, is clear enough, and so the jury were instructed. If he was misled into acquiescence by a show of authority which was not legal, but which he was induced to believe was so, it was only an aggravation of the trespass.

If the warrant of distress was a nullity, in consequence of the death of Kingman, and if the administrator had no legal power to make distress, either personally or by bailiff, then the defendant's justification wholly fails, as there was no lawful authority for taking the goods, although there may have been rent in arrear. It was not a mere abuse of authority so as to make *case* the proper remedy; but an unlawful taking, without authority, and trespass was properly brought.

The motion for non-suit, as well as for new trial, is therefore refused.

GANTT, EVANS and BUTLER, JJ. concurred. RICHARDSON and O'NEALL, JJ. *absent*.

Sullivan for the motion; *Irby* contra.

Allen Jones vs. Hugh Muldrow and others.

Defendant, in trespass claimed as tenant of S, and adduced evidence to his tenancy and to S's title; but was proved to have entered as plaintiff's tenant, and was, therefore, evicted. This did not conclude him, after having regained possession, from holding under the title of S.

A point on which evidence has been given, on the trial, but on which, in consequence of what afterwards appears, the party is not permitted to rely, is not concluded by the verdict.

Where it did not fully appear, by the record, what was the precise issue submitted to the jury, other evidence was admitted for the purpose of ascertaining the scope of their verdict.

Before O'NEALL, J. at Darlington, Spring Term, 1840.

Trespass quare clausum fregit. The close was, originally, the property of one Stephenson. As such, it was sold, by the sheriff of Darlington, Richard Ingram, to John Ingram: by John, it was conveyed to Bryant Ingram; by him, to Richard Ingram, and, by him, to Pleasant R. Gee, who sold to the defendant, Muldrow, executed a bond for titles, and died. The heirs of Gee, for Muldrow, brought suit (by a previous action, *Gee vs. Jones*, Rice R. 64,) against this plaintiff, Jones, and his son, James, for the recovery of the land. Jones's defence was, that he was in possession under Ste-

phenson, and that the sheriff's sale was fraudulent ; but it was proved by the plaintiffs in that case, that Jones had gone into possession as the tenant of Richard Ingram. Jones was ejected by a writ of *habere facias possessionem*, and Muldrow was put in possession.

About a year afterwards, while Muldrow's tenant was removing from the land, Jones entered and retained possession under Stephenson.

The defendants now contended that the plaintiff was concluded by the former recovery, and could not set up Stephenson's title. But the court thought that Stephenson's title had not been legally in issue on that trial ; for Jones had been estopped, by his tenancy to Ingram, from relying on it.

Curia, per BUTLER, J. The true question, in this case, is, was Jones barred by the recovery against him, in the case of *Gee vs. Jones*, from availing himself of Stephenson's title at any subsequent time, either by action, or in defence. And this question depends, not only on what was decided in that case, but upon whether it be allowable to inquire into and ascertain by evidence, what was the issue which was submitted to the jury, and which *necessarily* fell within the scope of their verdict. For, if the verdict of the jury was but the judgment of the law upon a point that superceded all others, and which must have precluded the consideration of Stephenson's title, then the case would be relieved of some of the embarrassing circumstances that seem to attend it.

There was nothing apparent on the record of *Gee vs. Jones*, that could be pleaded, or used by the present defendants by way of *estoppel* to Jones's rights under Stephenson's title. An estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact which, having been once distinctly put in issue by them, or by those with whom they are privy in estate, or law, has been, on such issue joined, solemnly found against them. It is not the recovery, but the

matter alledged by the party, and upon which the recovery proceeds, that creates the estoppel. (*Outram vs. Morewood*, 3 East. R. 355.) Now, if Jones had alledged in his pleadings, in the case of Gee against himself, that he relied on Stephenson's title, then the verdict would have been an estoppel to him as to the same title. No such thing appears on that record, and the recovery may or may not be a bar, according to circumstances.

If Stephenson's title, which, it seems, was given in evidence by Jones on that trial, either was, in fact, or could have been passed on by the jury, it might be a bar as to the parties to the record and their privies. This brings up the question, is it competent to go into that trial to ascertain what were the issues submitted to the jury, and upon which they must have decided?

In the case of *Seddon vs. Tutop*, (Esp. R. 401,) it was decided that, where there has been judgment by default, in an action on a bill of exchange, and, also, for goods sold and delivered, and the plaintiff, by mistake, takes a verdict for but one of these demands, he may afterwards maintain an action for the other. Lord Kenyon, who delivered the opinion of the court, says, "where a man brings an action, it must be presumed it is for the whole of his demand, but it is not conclusive; he may shew that, in point of fact, he did, in such action, go to recover part of the demand only. He may also shew that he did not, under the first action before the jury, go into any evidence of that demand which is the subject of the second action; for, if he did, and failed, it would be conclusive." According to this, was it not competent for the plaintiff, Jones, to go into the evidence, to shew what were the issues which were submitted to the jury on the former trial? I think he was properly allowed to go into such evidence.

This does not relieve us from another serious difficulty, which is, that it did not appear that Stephenson's title was in

evidence on the former trial; and, if the jury could have passed on it, it fell within the scope of their verdict, and was concluded against this plaintiff. Upon examination, it will be found that the jury was not required to decide on that matter. Their verdict must be referred to a matter on which the law, itself, had pronounced its judgment independently of all other questions involved: viz. that Jones, having gone into possession of the land, as the tenant of Richard Ingram, could not claim against his landlord by any title which he might have acquired. The circuit judge reports that it was *proved*, on the former trial, that Jones had been put in possession of the land as the tenant of Richard Ingram. Whilst he occupied that relation, it is evident he could not acquire and be clothed with any other title, to defeat that of his landlord. It was not competent for him to be invested with Stephenson's title until he was either evicted, or had gone out, himself, voluntarily. From the report, we must assume that the question was not submitted to the jury, whether Jones was tenant of Ingram; but that it went to the jury, as a conceded or established fact, that he was so. And, for the purpose of presenting the case as I wish to consider it, suppose that, when Jones was sued by Gee, he had set out in a plea that, since he went on the land, he had acquired Stephenson's title, and that he was, by virtue thereof, the true owner of the land; and the plaintiff had replied that such plea should not avail him, for that, by a written lease, Jones had gone on the land as tenant of the plaintiff, or his lessee; and that Jones had demurred to this replication. The judgment of the court would have been, to over-rule the demurrer; the effect of which would have been, to evict Jones on account of his tenancy, and not to touch Stephenson's title, which was admitted by the demurrer. The case having gone to the jury on this precise state of facts, their verdict embraced nothing more than the conclusion of law. Not that the title set out, or given in evidence, was bad, but that Jones could not avail

himself of it. The validity of the title, and Jones' ability to use it, are different things. Technically and strictly speaking, Jones was not availably and beneficially invested with Stephenson's title, until after his eviction, and therefore subsequent to the former trial.

I think, therefore, that Jones was not precluded, by any thing in the former recovery, from protecting himself under Stephenson's title, which, it seems, was never divested by the basely fraudulent attempts to destroy it.

But it is said that, when Jones took Stephenson's title, or rather, authority to enter under it, he should have gone out and have brought his action, either in his own, or in Stephenson's name, and that, not having done so, he was precluded from all right to resort to it at any subsequent time, without offending the maxim, *nemo debet bis vexari*. The course indicated may have been desirable, but I do not think that a man's mistake, or forbearance in the assertion or exercise of his rights, should always destroy, or put them in jeopardy, so that he cannot ultimately enjoy them. After Jones' tenancy had been dissolved by his being put out of the land, he had a right to re-enter under the true legal title, unless it had been previously adjudicated; which we think had not been done. His entry on and possession of the land being lawful, the plaintiff has shewn his right to maintain this action. The verdict must therefore stand, and a new trial is refused.

GANTT, RICHARDSON, EVANS and EARLE, JJ. concurred.

Dargan & Sims for the motion ; *Law*, contra.

Benjamin Jackson vs. Edward Lewis and Miles Williams.

Law of *Navigable Rivers* considered.

Quere, whether the *Catawba*, in Chester district, is a navigable river.

Quere, whether an unnavigable channel, severed by an island from the main stream of a navigable river, be subject to grant.

Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations.

Defendant, in trespass for a fishery, under the plea of *liberum tenementum* shewed a title in common with G.: but plaintiff proved an elder title. G's testimony was then offered to prove defendant's right by prescription to fish—objected to for interest, as tenant in common, but held competent.

Before EVANS, J. at Chester, Spring Term, 1839.

Trespass for breaking up the plaintiff's *fish-stand*, in the *Catawba* river. Pleas,—general issue and *liberum tenementum*.

The plaintiff claimed, as owner of the soil, under a grant to one Platt, in 1772. The defendant relied on a grant to one Massey, in 1773, who conveyed to Perry, who conveyed half the land to the defendant. The other half was afterwards conveyed, as Perry's property, by the sheriff, to Jeremiah Gaither. The stand was erected on the west branch of the river, between the main shore and Mountain island; the stream being divided, by that island, into two channels, of which the eastern one is navigable, but the western never used for boating. Each of the grants in question covered both shores and included spot on which the stand had been. The presiding Judge inclined to the opinion, that the *Catawba*, as a navigable river, was not subject to be held under a grant of vacant land, and remarked that, when he came to the bar, the controversies about the fisheries on this river were very common; and he had a strong impression that the grants of the rocks and places within the stream, where fish stands were erected, had been held void. Nor did it appear

to his Honor that the boat sluice being on the other side of the island varied the case. But these points he reserved for the consideration of the Appeal Court.

The defendant proved that those under whom he claimed had been accustomed to take fish at this stand for a long time. The season was only a month, or six weeks in each year, and the stand was abandoned till the year ensuing. His Honor thought that this was not such a possession as would give title, under the statute of limitations, against the plaintiff's older grant; but, on the question, whether the defendant had acquired a right to the fishery and the stand by *prescription*, the jury were instructed that twenty years uninterrupted use would give a right even against the State, and that such use need be only co-extensive with the right claimed. On this point there was evidence on both sides.

In the course of the trial, Jeremiah Gaither, being called as a witness, was objected to as tenant in common with the defendant. Under the defendant's plea of *liberum tenementum*, the question was, is the land his; so the court thought the witness was not competent.

Verdict for the plaintiff.

The defendant moved the Court of Appeals for a non-suit, on the ground that, the Catawba, being a navigable river, no part of its bed could be claimed under a grant: and for a new trial, because the evidence of Gaither had not been admitted.

Curia, per EARLE, J. In *Boatwright vs. Bookman et al.* this Court decided that the right to take fish in public navigable rivers is common to all; and that, in the exercise of that right, one may lawfully put a trap, or other fixture in the channel of the river, without making himself liable as for a public nuisance, if such trap or other fixture do not interfere with the navigation, or obstruct the free passage of fish. Whether the public is the actual owner of the soil covered by water in such rivers, or has merely a servitude for the public interest, as a

highway by water, the Court thought might deserve consideration; and they did not think it necessary to decide whether the owners of the soil on either side possess any exclusive right of fishery, or to what extent. In this case the grants, both of the plaintiff and defendant, do not stop with the shore, calling for the river as a boundary, but have been so located as to include the whole stream on the western side of Mountain Island, the channel on the eastern side being that which is used for navigation;—and they both include the place, in the stream, where the plaintiff's fixture was put up. That under which the plaintiff claims, is by many years the oldest; and, as the land granted in both is on the same side of the stream, no question arises on the application of the rule of *usque ad filum aquæ*. But, in such a stream, not navigable, and not proved to be capable of being made navigable, the Court would not undertake to say that the owner of the soil may not have, by virtue of his grant, an exclusive right of fishery to the middle of the stream. Indeed, at common law, such a right would exist, without regard to the circumstance of its being capable of navigation. How far that principle is applicable in this country, and how far it may have been modified by legislation or usage, need not here be considered. I presume any exclusive individual right in the owner of the soil, if allowed to exist, would, of course, be subject to such municipal regulations as the Legislature might adopt, both in regard to navigation and in regard to the free passage of fish.

Whether therefore, as in Pennsylvania, the soil and the waters of rivers, such as the Catawba, with the rights and privileges incident thereto, remain with the public, (which, as was said in *Boatwright vs. Bookman*, may depend on the Acts regulating the granting of vacant lands, or on the grants themselves,)—or whether, as at common law, the owner of the adjoining land is entitled to the exclusive fishery to the middle of the stream; the defendant, and those under whom he

claims, are equally excluded from any supposed benefit derived from the grant to Massey in 1793. In the former case, the grant, if the oldest or only grant, conferred no right of exclusive fishery as incident or appurtenant. In the latter case, the right had already vested in a former proprietor by virtue of the grant to Platt in 1772. Supposing the right not to be incident to the grant, but to be public and common, then the plaintiff in the exercise of a common right, had erected a fixture or fish stand, where he lawfully might and for a lawful purpose,—and it was a trespass to destroy it. So, if it were incident to the grant, and passed with it, he was equally in the exercise and enjoyment of his exclusive right, and the defendant was equally a trespasser.

But the right of fishery, either as against the public, or as against an individual proprietor, may be acquired by prescription. And such was the defence attempted here. But the right by prescription which the defendant set up, was not alleged to have been acquired by himself, but by Perry, a former proprietor of the land granted to Massey, under whom defendant also claimed the same land. None of these parties, either plaintiff or defendant, were, or had been in the actual occupation or cultivation of the land granted. The constructive possession of the soil, therefore, was with the plaintiff. But the case attempted to be made, was that Perry had, for very many years, annually occupied this particular spot, with a similar structure, for the purpose of taking fish, and had therefore acquired a prescriptive right, either against the public, or against the individual proprietor of the elder grant. And for this purpose he offered Jeremiah Gaither as a witness, whose competency was objected to, on the ground of interest, from these facts: Massey conveyed to Perry, about 1802; Perry conveyed to defendant, Lewis, an undivided half of the land, in 1827, describing it as "a plantation or tract of land lying on an Island in the Catawba River, known by the name of Mountain Island," with the appurtenances; and, in 1831,

the other half was sold by the Sheriff, under judgment and execution, as Perry's property, and purchased by Gaither, to whom the Sheriff conveyed it. He was therefore tenant in common with Lewis, and said to have an interest in sustaining the prescriptive right; and was excluded by the Court. This constitutes one ground of exception to the verdict. The Court are of opinion that the witness was competent.

In regard to the interest which will exclude a witness, the general rule seems to be, that if a witness will not gain or lose by the event of the trial, or if the verdict cannot be given in evidence for or against him, in another suit, the objection goes to his credit only, and not to his competency. An interest in the question only, will not, therefore, generally disqualify a witness. He must either be interested in the result of the action, or in the record, as an instrument of evidence. In the application of this rule, it is held that, where a right of common is claimed by custom, one who claims under the same custom cannot be a witness in support of the claim, as he might afterwards use the verdict, in his own cause, to establish his own customary right. (1 Term 302; 3 id, 32.) And here, if the defendant had justified by plea, under a prescriptive right of fishery in himself and Gaither jointly, and had offered Gaither to prove it in Perry, their grantor, in right of the particular estate which they held of him, I think he would clearly have been incompetent. *Jacobson vs. Fountain et. al.* (2 John. Rep. 170.) But the plea is *liberum tenementum* in the defendant; and the proof was that Perry, in whom they set up the prescriptive right, was never in the occupation and enjoyment of the particular estate, the freehold of which was in the plaintiff. Whatever right, therefore, may have been established by prescription in Perry, either against the public, or against the grantors of the plaintiff, was an incorporeal hereditament, not incident to the particular estate, and, therefore, did not pass to Gaither, or to the defendant, by virtue of the several deeds under which

they held; not denying that it may have been such a right as would pass by deed. Gaither, therefore, had no interest in the result of the action, nor in the record as an instrument of evidence. But the same considerations which prove the competency of the witness, show that the proof could not have availed the defendant; and that the issue made, whether there existed a prescriptive right in Perry, was an immaterial issue. The action was trespass; on the plea of *lib. ten.*, the case was against the defendant. And it was no justification that Perry, who, in that regard, was a stranger, had a right by prescription to take fish there.

As the counsel who makes the motion states distinctly, that Gaither was offered only to sustain the prescription in Perry, and for no other purpose; and as we think it could not have availed the defendant, if established, it could be of no benefit to order a new trial on that ground.

The motion is therefore refused.

GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, JJ. concurred.

Clark & M Dowell, for the motion; *Gregg*, contra.

The State, at the Relation of John Fox, vs. Reuben Harmon.

The District Election Act of 1815 is not absolutely repealed by that of 1839, and was the proper law to govern an election held, after the passage of the new Act, to fill a vacancy which had occurred before it.

Minute irregularities, not affecting the fairness of an election, will not invalidate it.

A clerk of court appointed to fill a vacancy by death, resignation, &c., holds only till the expiration of the term of the original incumbent.

The day prescribed, by the Act of 1839, for the managers to meet and declare the election, is misprinted in the published Acts, *Monday*. It should be *Wednesday*.

Before O'NEALL, J. at Chambers, 5th March, 1840.

The following is the report of the Circuit Judge, in this case :

" This was an application for a *quo warranto* against the respondent. It appeared that Edwin Scott, the former clerk of Lexington district, resigned in 1838, and the respondent was appointed *pro. tem.* by the Governor. In October, 1839, he advertized an election to take place on the second Monday and Tuesday in January, 1840. In the December succeeding, the Legislature passed an Act, by which it is provided that, "whenever a vacancy is *about* to occur in the office of clerk, ordinary, or sheriff, in any district in this State, by expiration of the term of the incumbent, it shall be the duty of the acting clerk of the court of common pleas, at least two months before the term when such vacancy shall happen, to advertize an election at the court house door," &c. (Acts of 1839, sec. 1, p. 37.) By the 2d section it is provided, "when any vacancy *shall* occur in either of the offices aforesaid, by the death, resignation, removal from the district or State," &c., it shall be the duty of the clerk to advertize for an election, &c. The 4th section provides for the meeting of the mana-

gers at the court house, in the printed copy, on the *Monday* after the votes are received, but it should be on the *Wednesday* after the votes are received.

"The managers went on, and held the election on the second Monday and Tuesday in January, and, on the Thursday following, met at the court house, counted the votes, heard a contest, and declared the relator duly elected, who was commissioned by the Governor.

"I thought the relator was entitled to the office. The election was properly held under the Acts of 1815; (A. A. 1815, p. 56;) for the Act of '39 did not provide for the case of a vacancy existing at the passing of the Act. It applied exclusively to vacancies occurring after its passage. It contained no repealing clause. The Act of 1815 was therefore in full force, and governed cases occurring before the Act of '39.

"The notion that a clerk appointed *pro. tem.* was entitled to hold for four years, seemed to me to be unsustained by any thing like reason or law. The clerk has no constitutional tenure of office; it is one altogether regulated by Act of the Legislature. When the Legislature gave the Governor power to appoint until the office should be filled by election, an appointment under this authority could confer no greater tenure. It was not like the case of the sheriff, whose tenure was regulated by the Constitution; when once in office, he was in for four years, his constitutional term.

"Information, in the nature of a *quo warranto*, was considered as previously filed by leave of the court, and the writ of *quo warranto* was ordered."

The respondent appealed, on the grounds:

1st. That no election could have been held under the circumstances; for the Act of 1815 was repealed, and the supposed vacancy in question was not provided for by that of 1839.

2d. That the respondent was entitled to hold, under the Governor's commission, for four years.

3d. Because the managers had assembled on Thursday, (instead of Monday, as the law directed,) to declare the election.

4th. Because two thirds of the managers were not present to judge of and declare the election.

Curia, per RICHARDSON, J. We need add but little to the exposition, by the Circuit Judge, of the law, or of the facts upon which this application was made.

The Act of 1839 does not repeal the Election Law of 1815, (5 Stat. So. Ca. 13,) but so alters its provisions as to leave it applicable to only a few cases. I would not say that any further vacancy in office can be filled under its provisions: but it still stands to meet a possible case, and forms a part of our system of popular appointment to office. The Act of 1839, by its first section, provides for vacancies about to occur by the expiration of an office at its legal or constitutional termination; and requires the Clerks of Courts, "at least two months" before such regular termination, to advertise an election, in order to anticipate the expected vacancy. The Clerk is, also, to name some Monday *within* the sixty days (to prevent an interregnum, evidently,) but exceeding thirty days, after the date of his advertisement, as the day of election. The 2d section provides, "when any vacancy *shall* occur" by death, omission, or refusal to serve, or the like, the Clerk shall give the same timely notice, and so forth. Both sections are prospective, and provide for vacancies that were to occur after the passing of the Act, (21 December, 1839.)

The question, therefore, is, did the vacancy in the Clerk's office, at Lexington, exist on the 21st December, 1839.

The Act of 1815 provides that elections, to fill such vacancies, shall be holden on the second Monday, and the day after, in January; and the officer elected shall go into office

on the second Monday in February thereafter. And the third section of that Act provides that the Governor shall fill up all vacancies, &c., "to hold under such appointment until such time as an election shall take place," &c. When the Governor, then, appointed Reuben Harmon to the office vacated by Edwin Scott, the appointee was to hold the office, either till the election in January, or, perhaps, to the second Monday in February,—when, by the Act, the person elected would go into office. Now, then, if we are to consider the Clerk's office as vacant from the moment Edwin Scott resigned it, the vacancy had occurred before the Act of 1839; and therefore the election could not be brought under its provisions, and the argument of the Circuit Judge would be conclusive.

But, if we are to consider the appointment of Reuben Harmon as a legal filling of the vacancy, so as to constitute a perfect term of office, to expire regularly, either upon the election in January, or on the second Monday in February; then no casual vacancy had occurred so as to bring the election within the second section of the Act of 1839; but it would be, in the language of the second section, "a vacancy about to occur" upon the regular termination of the office, (in January, or February;) and, then, the Clerk could not have advertised "at least two months" before the term of the office would have expired, for two months could not elapse between the 21st December and the second Monday in February.

It is plain, then, that under any construction, the vacancy in question could not have been filled by an election held under either section of the Act of 1839; and the managers, therefore, very properly held the election under the Act of 1815.

It is still very possible that other elections may yet be held under that Act. The Act of 1839 requires that the Clerk shall advertise the elections, and a subsequent section renders

him indictable for a high misdemeanor, if he fail to give the notice required by the Act; and, upon such failure of the Clerk, the Commissioners are directed, nevertheless, to advertise and hold the election. But suppose the very possible case of there being no Clerk to give the notice, and, of course, no Clerk to *fail* of giving the notice. Is it not at least questionable whether the managers would not, in that case, be obliged to hold the election under the Act of 1815, in order to prevent its failing altogether?

The chief grounds of exception to the election of the relator are, then, clearly unfounded in law. To meet the objection of irregularity, which the grounds suppose, it may be observed, that the end of popular elections is to discover which of the candidates has the greatest number of votes from among the qualified voters. The polls are, of necessity, holden by many persons, at different places, and such elections are, of course, subject to irregularities. Where, then, after legal notice to the voters, the polls have been fairly holden by the proper managers, at the places, and for the time designated, and one of the candidates has received a greater number of votes than the rest; he is the proper appointee, and the end of the election is answered. It follows, irresistibly, that we are to construe the rules for the regulation of popular elections with a constant direction to that end, and not to be deterred by minute objections and mere irregularities of manner or form. It is upon such considerations, that both the Act of 1815 and that of 1839 make the validity of the election depend, in the first instance, on the decision of the managers themselves. By the former Act, a majority may decide; by the latter, the presence of two thirds is required: which answers the fourth ground of appeal, in reference to the number required to decide the election. That ground applies to the Act of 1839, only. In fact, all the objections to the election of the relator depend upon the assumption, that the election ought to have

been held under that Act; which being shown to be groundless, the rest have no material application to the case.

Upon the whole case, therefore, the Court are unanimous in confirming the judgment of the Circuit Judge, and the appeal is dismissed.

IN THE COURT OF ERRORS;

AT

COLUMBIA, SPRING TERM, 1840.

JUDGES PRESENT.

HON. R. GANTT,
" J. S. RICHARDSON,
" J. B. O'NEALL,
" B. J. EARLE,
" A. P. BUTLER,

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
" WM. HARPER,
" JOB JOHNSTON,
" B. F. DUNKIN,

Wm. J. Allston and others vs. W. Thompson.

A deed without any subscribing witness is not a valid deed to convey land.

Before EVANS, J. at Greenville, Fall Term, 1838.

This was an action of trespass to try title. Plaintiff traced his title through a deed from Robert Cochran, Marshall of the United States, for the District of South Carolina. This deed was without any subscribing witness, and the only proof of it

offered was evidence to the hand writing of Cochran. There had been no possession under it.

The Court was of opinion that, as this deed was not in the form prescribed by the Act of Assembly, nor in that of any of the Common Law modes of Conveyance, and was without a subscribing witness, it was not a valid deed to convey land. So the plaintiff was nonsuit.

The plaintiff moved the Court of Appeals, in November, to set aside the nonsuit; and, the Court being equally divided upon the question, the case was carried up to the Court of Errors, and postponed to the next term.

In the mean time the following similar case occurred of *Craig vs. Pinson*, and the two cases were considered together by the Court.

Archibald Craig vs. Howard Pinson.

A deed with only one subscribing witness is not a valid deed to convey land:

Before O'Neill, J. at Laurens, Spring Term, 1839.

This was an action of trespass to try title, in the course of which a deed was introduced, *not pursuing the form prescribed by the act of 1795*, and executed in the presence of one subscribing witness, by which the plaintiff had conveyed the land in dispute to a third party. Upon the presiding Judge intimating that the deed was a good conveyance, and the title, therefore, out of the plaintiff, he took a nonsuit, with leave to move the Court of Appeals to set it aside. Which motion was now made.

Curia, per BUTLER, J. It was conceded in argument that the paper in question, in this case, if valid at all as a deed, must be so under the Statute of Uses, as a *bargain and sale*; for it was not pretended that it was good as a Common Law instrument, there never having been livery of seisin, or possession under it. It must be judged of according to its literal purport

and what appears on the paper itself. It must be assumed that it was duly signed, sealed and delivered, and that it had one subscribing witness. And the question then arises, can a deed of bargain and sale be good and effectual for the conveyance of freehold, according to the law of South Carolina, without having at least two subscribing witnesses?

In 2 Comm. 307, Blackstone says, "the last requisite to the validity of a deed is the attestation, or execution of it, in the presence of witnesses; though this is necessary, rather for preserving the evidence than as constituting the essence of the deed." From which it would seem, that according to the laws of England, subscribing witnesses are not essentially necessary to the validity of a deed. In the early and barbarous ages of the law, few could write or sign their names; and a deed derived its validity from the seal and the transmutation of possession from one to another. This was done usually in the presence of many witnesses, and with great form and ceremony. I doubt whether there ever was a deed, either at common law or under the statute of uses, that was not executed in the presence of witnesses. Livery of seisin seems to imply publicity and the presence of witnesses. I have examined many forms of deeds presented by conveyancers, and all of them, without exception, have a clause of attestation in the presence of at least two subscribing witnesses. Such has been the universality of the practice in this country, that all my brethren concur in saying that they never saw an effectual deed for the conveyance of land, (unless this be one,) which was not executed in the presence of subscribing witnesses. An instrument of this kind has been held good, as an agreement in writing, to authorize equity to direct a specific performance.

It is supposed that the deed which was held a good bargain and sale in the case of *Rugg vs. Elles*, (1 Bay R. 107,) was without subscribing witnesses. Such a conclusion is not justly inferable from the report of the case. The deed bore

date, 10th August, 1785, and was said to have been executed in the presence of witnesses. The reporter does not undertake to give the entire deed literally, but says it was "in substance, as follows." There is neither seal nor witness to it, as copied; and yet it is certain there was a seal to the original, and probably witnesses. Whether witnesses were legally necessary, was not a question in the case; the question was, whether, in character, it was a bargain and sale; and, if so, whether a bargain and sale was effectual to carry land without livery of seisin; and it was determined that it was. But if it *had* been held that witnesses were unnecessary, then it would not affect the question now before the court, as that decision was made before '95.

I will now enquire what is a deed and bargain of sale, and see whether, in its essential and distinctive characteristics, it is distinguishable from the form of deed presented by the Act of '95. In the case of *Rugg vs. Elles*, the reporter says, at the conclusion of the opinion of the court, that since the decision of the case, which was in 1790, (the reporter publishing his work in 1809,) by an Act of the Legislature, a bargain and sale is declared to be a good deed to pass the fee, in all cases, without livery of seisin. I can find no other Act, and I believe there is none, on the subject, except that of 1795, which presented the form of deed now in use; and that, the reporter regarded as nothing but a bargain and sale. And when examined and analyzed, it will be found to be nothing else; or, at least, it includes a bargain and sale in it.

One of the species of conveyance introduced by the statute of uses, which, as Blackstone says, is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells, that is, contracts to bargain and sell, the land to the bargainee, and becomes, by such a contract, trustee for and seised to the use of the bargainee; and then the statute of uses completes the purchase. But, as it was foreseen that conveyances thus made would want the notoriety which the old common law assurances were intended to give; to prevent,

therefore, clandestine conveyances of freehold, it was enacted in the same session, by Stat. 27, Henry 8, c. 11, that such bargain and sale should not inure to pass a freehold, unless the same be made by *indenture*, and enrolled, within six months, in one of the courts of Westminster Hall, or with the *custos rotulorum* of the county. It is evident that this last statute, requiring enrolment, could not have been practically in force in South Carolina; as such deed could not have been enrolled or recorded as therein required; and the only deed of the kind, the one in the case of *Ruggs vs. Elles*, noticed in our reports, was a deed poll, and not an indenture. A bargain and sale must, therefore, have been regarded as good under the statute of uses. Such a mode of conveyance seems not only to have received the sanction of the court, but is recognized in several Acts of our Legislature, before and after the revolution. In what is called the quit-rent Act of 1731, it is enumerated, among others, (3 Stat. So. Ca., 302, sec. 28;) also in the recording Act of 1789, (5 Stat. So. Ca., 127.) It must be regarded, now, as having the same validity as *lease and release*, and, it seems to me, for the very same reasons; for lease and release was, essentially, a bargain and sale under the statute of uses, and was introduced to evade the 27 Henry 8, requiring the enrolment. It is very certain that lease and release was the usual conveyance of land in South Carolina, previous to '95, notwithstanding other conveyances were regarded as legally valid. Some doubts must have been entertained as to a bargain and sale, strictly so called, or its simplicity would have recommended it to general use, and would have obviated the necessity of the Act of 1795.

I have said that lease and release was but a complicated form of bargain and sale. Blackstone says, "a lease, or rather bargain and sale, on some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee; now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year, and the statute

immediately annexes the possession. He, therefore, being in possession, is capable of receiving a release of the freehold, or reversion." Lease and release was supposed to have the advantage of feoffment, as there was supposed to be possession under it. Lease and release was effected by two deeds, one a bargain and sale, and the other a release, a sale by release. What has the Act of 1795 done, but reduce this mode of conveyance into one deed? There could not be a lease and release without a bargain and sale. This is the language of the Act of 1795: "Whereas, the mode of conveying land by lease and release, is expensive and inconvenient, &c.; be it enacted that the following form or purport of a release shall, to all intents and purposes, be valid and effectual to convey from one person to another, the fee simple of any land or real estate, if the same shall be executed in the presence of and subscribed by two or more credible witnesses." The language of the form presented is, "have bargained, sold and released, and by these presents do bargain, sell and release." What does it amount to, but bargain and sale and release? It combines in it all the operative qualities of both; it includes in it bargain and sale; and to maintain that to write on a piece of paper "I, A B, do bargain and sell," would be good; but, when the word release is added, it would be bad, would be to say, the minor, which is included in the major, could be good, where the major, which includes the minor, would be bad. In other words, a bargain and sale, isolated and alone, would be good, but where included in a deed of release, would be bad. I think the proposition cannot stand the test of scrutiny. The form prescribed by the Act, is a reduced form of bargain and sale, lease and release, and where any paper having these qualities, is intended to operate as a deed for the conveyance of freehold, it must have two subscribing witnesses. The paper before the court has but one, and cannot be supported as a deed. If such papers were allowed to operate as deeds, human vigilance could not guard against the mischiefs of clandestine and fraudulent conveyances. Courts

should never throw down the barriers of security, which the law has wisely and judiciously constructed for the protection of property.

The Act of the Legislature does say that the form prescribed should not invalidate the forms heretofore in use in this State; that is, all Common Law modes of conveyance which were attended with notoriety and transmutation of possession from one to another. All other forms are excluded by the one presented.

Upon the whole, we are dissatisfied with the decision below, and order the nonsuit to be set aside. [In *Craig vs. Pinson*; but motion dismissed in *Allston vs. Thompson*.]

JOHNSON, GANTT, EVANS, JOHNSTON, EARLE and DUNKIN, JJ., concurred.

O'NEALL, J., *dissenting*. In these cases, I have the misfortune to differ from a majority of the Court. That the deeds, at Common Law, are good as deeds of bargain and sale, without witnesses, is abundantly shown by the argument of Mr. Perry, to which I refer for a correct statement of the law. As I understand my brethren, I believe they do not deny this; but they contend that the form adopted by the Act of '95 is, in substance, a *feoffamentum*, a bargain and sale and release, and that all deeds executed since, must have some of these requisites, and must, of course, have two witnesses. With great respect and deference, I think this argument more specious than solid. It is true, the operative words of these several modes of conveyance, are to be found in the form prescribed by the Act. But because it combines them all, it does not follow that it is any one of them. It is a new creation made out of them all, and when it is adopted, then, two witnesses are required. But notwithstanding the Act of '95, any one of the Common Law modes of conveyance may be resorted to, and there is nothing in the Act which reaches it; for the provision in the enacting clause declares that the form established by the Act was not to have the effect "to invali-

date the forms heretofore in use in this State." This saved every interest arising from or by any other mode of conveyance.

It has been supposed that the recording Act of 1785, must have some effect on the decision of this case. In one point of view, I admit, it has. Its plain words show that witnesses were not necessary to the validity of a deed. Writing, signing, and sealing, are the only three requisites to make it binding between the parties. Against purchasers without notice, recording is a fourth requisite. To admit such deed to record, it was required, by the Act of '85, that it should be acknowledged by the grantor or grantors, or by proof of the signing, sealing and delivery, by the oath of two credible witnesses in open Court. The Act of 1788 (P. L. 453,) altered this provision, and dispensed with the necessity of an acknowledgement of the grantor, or probate by the attending witnesses in open Court, and provided that an acknowledgement by the grantor or grantors, before a judge of the Supreme Court, or *oath of one witness*, before a magistrate out of court, swearing that the deed was duly executed, should be sufficient to admit the deed to record. These provisions, it is plain, do not affect the validity of the deed as between the parties. They are intended to prevent double conveyances; and it may be that a deed which could not be admitted to record, for want of proof, might not operate against a purchaser.

But let it be conceded that these provisions reach the deed as between the parties: what then? There is nothing in the Act of '85, which speaks of attesting witnesses. If the deed was acknowledged in open court by the grantor, or the facts of signing, sealing and delivering proved by two witnesses, it must go upon the record, whether there were or were not subscribing witnesses. This would show that the deed must be good without witnesses. The Act of '88 does speak of attesting witnesses; but, in the mode of proof adopted by it, it does not require proof by the subscribing witnesses: an

"acknowledgement before a judge of the Supreme Court, or oath of one witness before a magistrate out of court, swearing that the deed was duly and legally executed, as heretofore has been the practice to make proof," is all which it requires. In this Act, there is nothing to make subscribing witnesses necessary to the validity of a deed. For, admit that from its phraseology there must be a witness attesting the execution, does it follow that that witness must be a subscribing one? I think not; for a witness may attest a transaction and not make any memorandum of it.

But, if there must be a subscribing witness to a deed, how does it happen, in Craig's case, that the deed is to be adjudged void, when, in that case, there is a subscribing witness? But I hold that a deed not pursuing the form of the Act of '95 is good between the parties without a subscribing witness.

I think, if understood rightly, that the opinion of some of the judges turned upon the usage of the country. That it is usual to have two witnesses to attest the execution of a deed and subscribe the memorandum of execution, is true beyond all doubt. But that usage is attached to and follows the form of the Act of '95, and can therefore have no sort of effect. To say, however, that usage would render void a good Common Law conveyance, is giving to it the effect of a statute. That is a going a step, and a very great step, beyond any thing that I have before heard ascribed to usage.

In the case of *Allston and others vs. Thompson*, I think that the motion ought to be granted. In the case of *Craig vs. Pinson*, I think the motion ought to be dismissed.

Perry, for the motion, (in Allston vs. Thompson.)

The plaintiffs claim under a deed from the Deputy Marshall of the United States. The deed is *without subscribing witnesses*, and the plaintiffs were *non-suited*. They offered to prove the execution of the deed, by witnesses who were acquainted with the hand writing of the Deputy Marshall, and were not permitted by his Honor, the presiding Judge.

The principal question for the consideration of the Court in this case, is, whether a deed, executed without subscribing

witnesses, be good and valid to pass lands in South Carolina. In determining this question, we must first consider whether the Act of 1795, "to facilitate the conveyance of real estates," renders null and void other forms of conveyance than that therein prescribed. Your Honors will perceive by reference to the Act, (2 Faust, 4, 5; 1 Brevard Dig., 176,) *that it does not*. The preamble states that "whereas the mode of conveying land by indentures of lease and release, is expensive, and is found by many inhabitants of this State to be very inconvenient; for remedy thereof, be it enacted," &c., "that the following *form* or purport of a *release*, shall, to all intents and purposes, be valid and effectual to convey," &c. "if the same shall be executed in the presence of, and be subscribed, by two or more credible witnesses." Then follows the form, and in conclusion is the following *proviso*, "That this Act shall be so construed as not to oblige any person to insert the clause of manority," &c., "*or to invalidate the forms heretofore in use within this State.*" There can, then, be no doubt that this Act was passed to shorten and simplify the form of a conveyance of lands, without in any manner interfering with other modes in use at Common Law, or under the *Statute of Uses*. If the parties desire it, they may still resort to "*the forms heretofore in use within this State.*"

Let us then consider what forms of conveyance were in use, prior to the Act of 1795, and whether witnesses were absolutely requisite to the validity of such forms. At Common Law, the forms of original conveyances were, "Feoffment," "Gift," "Grant," "Lease," "Exchange," and "Partition." And under the Statute of Uses, there arose the "Covenant to stand seised to uses," "Bargain and Sale," and "Lease and Release." (See 2 Comm. 310, 329, 338; 4 Cruise Dig., 43, 48, 88, 102.) It is probable, however, that the most usual forms of conveyance adopted in South Carolina, previous to 1795, were "Lease and Release," "Bargain and Sale," "Covenant to stand seised to Uses," "Grant" and "Lease" for terms of

years. These are the conveyances we most frequently meet on record, in the Register of Mesne Conveyance office, until the Statute "to facilitate the conveyances of real estates" was passed.

Witnesses were not necessary to any of these forms of conveyance. In support of this position the authorities are numerous and without contradiction, either by comment, or decision in England, or America. In 2 Comm. 307, it is said "the last requisite to the validity of a deed, is the attestation or execution of it in the presence of witnesses; though this is necessary, rather *for preserving the evidence*, than for constituting the essence of the deed." In 4 Com. Dig. 378, (tit. *Fait*, B, 4,) it is laid down in broad terms, that witnesses are not essential to a deed; and several authorities are referred to, in support of this doctrine in the United States, by the Editor. (1 Serj. & Rawle, 72; 1 Haywood, 205.) In a note on the same page, it is stated that, "in the reign of Queen Elizabeth, deeds were often without witnesses." In 4 Com. Dig. 36, it is said, "The eighth and last circumstance necessary to a deed, is the attestation of it by witnesses; which is not a thing essential to a deed, itself, but only constitutes the evidence of its authenticity;"—and that "Deeds, in the reign of Queen Elizabeth, were often without witnesses. Mr. Justice Windham said he had seen several deeds, made in Queen Elizabeth's time, without witnesses." This, too, it will be remembered, was long after the Statute of Uses, and has reference, therefore, as well to deeds under the Statute, as to those at Common Law,—to deeds of bargain and sale, lease and release, as to feoffments, grants, exchanges, &c. In 1 Phillipps on Evidence, 420, it is laid down that, "in cases where there is no subscribing witness on the deed, or where the subscribing witness denies having any knowledge of the execution," &c., "the execution may be proved by proving the hand writing of the party to the deed." In Perkins on Conveyancing, a book of high authority, as well as great learn-

ing of the Common Law, three things, and *only* three, are enumerated as "necessarily appertaining unto a deed; viz. writing, sealing, and delivery." This writer nowhere intimates that witnesses are essential to the validity of a deed. In 2 Campbell N. P. R. 636, Lawrence, J., says, "If the attesting witness swears he did not see the deed executed, I think it is then to be treated as if there were *no attesting witnesses*, and evidence of the handwriting of the party is sufficient proof of its execution." In a note to 2 Chitty's Blackstone, 248, the learned annotator says, "It is not essential to the validity of a deed, in general, that it should be executed in the presence of a witness." The requisites of a good deed are enumerated in Lord Coke's 1st institute, (lib. 1, c. 5, sec. 40,) and nothing is said of subscribing witnesses. Had witnesses been necessary to the validity of a deed, it would have been so laid down by this learned oracle of the Common Law. The words of Lord Coke are "This word, *deed*, in the understanding of the Common Law, is an instrument written on parchment, or paper, whereunto ten things are necessarily incident; viz. 1st writing, 2nd. on parchment, or paper, 3d. a person able to contract, 4th. by a sufficient name, 5th. a person able to be contracted with, 6th by a sufficient name, 7th, a thing to be contracted for, 8th. apt words required by law, 9th. sealing, and 10th. delivery."

It is manifest then, that although the Act of 1795 requires two witnesses to the form therein prescribed for conveying lands, it does not invalidate, or interfere in any way with, the forms in use at Common Law, or under the Statute of Uses; and that witnesses are not necessary to the validity of a deed at Common Law, or under the Statute of Uses. It follows, then, as a necessary consequence, that the deed from the Deputy Marshall is good, *as such*, without witnesses: in other words,—that if it be perfect, in every other respect, to convey land in South Carolina, it will not be rendered invalid by the want of subscribing witnesses.

This leads us to consider whether the present deed is in accordance with the forms by which lands were conveyed at Common Law, and under the Statute of Uses. It will not be pretended that the deed now under consideration is deficient, unless for want of "apt words required by law." All the other requisites enumerated by Lord Coke, it has.

What is understood in law, by "apt words" is, that the deed shall contain "words sufficient to specify the agreement, and bind the parties." (2 Comm. 297.) "It is not absolutely necessary in law, to have all the formal parts that are usually laid down in deeds, so as there be sufficient words to declare clearly and legally the parties' meaning." (Idem. 298.) In 4 Cruise D. 24, it is laid down that the words of a deed "must be sufficient to specify the agreement and bind the parties, legally and orderly set forth; that is, there must be words sufficient to signify the terms and conditions of the agreement, and to bind the parties." There can be no doubt that the present deed is a good one according to these rules. It does contain "words sufficient to specify the agreement," "to declare clearly and legally the parties' meaning," to "signify the terms and conditions of the agreement, and to bind the parties." But I can go further than this, and may, with propriety, say that the deed before the court contains exactly the "formal and orderly parts" mentioned by Cruise and Blackstone. They are eight, viz. premises, *habendum*, *tenendum*, *reddendum*, condition, warranty, covenants and conclusion. A deed may or may not contain all these formal and orderly parts, as the parties may determine. For instance, the clause of warranty may be inserted, or left out. So may the *reddendum*, the condition and the covenants. (2 Comm. 299 and 304.) The deed now under consideration does contain the premises, *habendum*, *tenendum* and conclusion, which was all it should contain; for the Marshall could make no warranty, there was no condition annexed, and nothing reserved.

If your Honors will refer to the old form of feoffment in 2 Comm. *App.*, it will be seen that the present deed is very much after that form, with the exception of the memorandum of livery of seisin endorsed on the feoffment. The form prescribed by the Act of 1795, is called, in that Act, "a form or purport of a release." The present deed is not very dissimilar to that form, and may, with the same propriety, be termed a release. But there can be no doubt that, as a form of *bargain and sale*, it is a good one. "A deed may be good, though it has not formal parts," (4 Com. D. tit. *Fait*, E, 1.) The words bargain, and sell, are not necessary to be contained in the deed to make it a good conveyance by bargain and sale. The words, 'alien and grant,' will be as good; and so will the words, "covenant to stand seized to the use of," or "granted, demised, set and to farm let" (4 Cruise D. 89.)

Now, if the deed from the Marshall is in accordance with the forms of conveyance, at common law and under the statute of uses, adopted in South Carolina before 1795, then it is a good deed, and is capable of passing land, notwithstanding the Act requiring two witnesses, and prescribing the form of conveyance.

I will now notice the objection, that there was no livery of seisin accompanying this deed, without which no freehold estates could be conveyed at common law. However true the objection may be to deeds at *common law*, it has no application to those deeds of bargain and sale, lease and release, which have arisen under the statute of uses. Livery of seisin is not necessary in those deeds, and has been dispensed with by St. 27 Hen. 8, c. 19, transferring the possession to the use. The words of this statute are, "Be it enacted that, where any person or persons," &c. "shall happen to be seised," &c. "of any lands and tenements," &c. "to the use, confidence or trust, of any other person," &c. "by reason of any bargain, sale, feoffment," &c. "in every such case, all such persons," &c. "that have, or shall hereafter have, any

such use, confidence," &c. "shall from henceforth, stand and be seised, deemed and adjudged, in lawful seisin," &c. "of and in the same;" &c. In commenting on this statute, Blackstone says that, "where a man covenants to stand seised of lands to the use of his child, the statute executes, at once, the estate; for the child, having acquired the use, is thereby put, at once, into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic." And, again, in speaking of bargain and sale, he says, "and the same is said of conveyance by lease and release." (2 Comm. 338, 9.) "These are held," says the commentator, "to supply the place of livery of seisin; and so, a conveyance by lease and release, is said to amount to a feoffment." In Co. Lit. 48, note 3, it is said, "but since the introduction of uses and trusts, and the Statute of 27 H. 8, for transferring the possession to the use, the necessity of livery of seisin for passing a *freehold* in corporeal hereditaments, has been almost totally superseded, and, in consequence of it, the conveyance by feoffment is now very little in use." "Before the statute of uses, equitable estates of freehold might be created through the medium of trusts without livery; and, by the operation of the statute, legal estates of freeholds may now be created in the same way."

I hope I have now shewn, that livery of seisin was not necessary to convey the lands called for in the deed under consideration; that this deed, being under the statute of uses, is good as a release, or bargain and sale, without livery of seisin. But I would further contend, if it were necessary, that it is a good deed, as a feoffment, although no livery of seisin be endorsed upon it. Livery of seisin may be presumed in law and equity, and should be, in this case. I refer to 12 Petersdorff's Abridg. 336. "A memorandum that livery of seisin was given, is *usually* endorsed on all ancient feoffments, but courts of law and equity will presume livery of seisin to have been given, though not endorsed on the deed, when the pos-

session has gone according to the feoffment for a length of time. A court of equity will supply the want of livery of seisin, when a feoffment appears to have been made for a good or valuable consideration." In 1 Bay R. 107, there is a case decided very similar to the present one. It was decided in 1790, five years before our statute prescribing the form of conveyance now in use. In that case, a deed had been executed, similar to the present one; and it was decided that "a bargain and sale is a good conveyance, under the statute of uses, to pass a fee, although no livery of seisin be made; so is a covenant to stand seized to bargainee's use." Judge Waties, in delivering the opinion of the court, says, "what shall be the effect of this deed, as a feoffment, bargain and sale, or covenant to stand seized? It would, perhaps, require much refinement to make it a good feoffment. Possession in deed, acquired in any way, might operate as a good livery of seisin under it, and, with the possession, it would be a good title." (There was no possession in that case.) "But there is no need at all of a strained construction to make this a good deed. I consider it as a good bargain and sale. The consideration, in part, was executed, and is acknowledged on the face of the deed. The terms of it shew a plain intent to pass the estate. The deed, therefore, must stand," &c. In a note to this case, the reporter says, "By an Act of the Legislature, since the determination of this case, a bargain and sale is declared to be a good deed to pass a fee, in all cases, without livery of seisin."

It would seem, from the above decision, that the Act of 1795 is nothing more than a declaratory Act, with the addition of the subscribing witnesses. The same deed of bargain and sale that would now pass lands under this statute, with subscribing witnesses, would have passed the same lands, before the enactment, without witnesses, and may *still* pass them without subscribing witnesses. This was not, perhaps, the first declaratory Act passed by our Legislature; nor has it

been the last. In 1824, an Act was passed, declaring "that no words of limitation shall, hereafter, be necessary to convey an estate in fee simple, by devise," &c. In 4 M'C. Rep, 442, 476, the court decided that the law was as declared in this Act, before the passing of the same, and that it was only declaratory.

There is another argument in support of this deed, that might be urged. It is that the conveyance was made under an Act of Congress, and, although it may not be in conformity with the forms adopted in this State, it may yet be good. The Act of Congress is general, to all the marshals in the different States, requiring them to advertize and sell the lands that the owners had not paid the direct tax for, and directs them to make title to the lands they sell ; but no form of conveyance is prescribed. The local laws of a State are not to control a constitutional law of Congress. If the deed be good under the Act of Congress, it must be valid under our State laws, no matter what be its form.

But it may be submitted whether any title at all be necessary to sustain this action. The deed of the marshal is not conclusive of sale. The action may be sustained by proving the assessment, sale, &c., without any deed.

The State, at the Relation of E. B. Bronson, vs. M. W. Hunter.

The term of office of *Ordinaries*, is subject to be limited by Act of the Legislature, and is now limited, by A. A. 1833, to four years.

Before O'NEALL, J. at Darlington, Spring Term, 1840.

This was an application for a *quo warranto*.

After the respondent, elected since passage of the A. A. 1833, (p. 60,) had held for four years, an election took place, and the relator was duly returned. But the respondent refused to give up the office, alledging that his tenure was during good behavior.

The court granted the order for the writ; supporting its judgment by an able argument, which is only omitted because its reasonings are embodied in the subsequent opinion of the Appeal Court, upon the motion of the respondent to reverse the order of the court below.

Curia, per JOHNSON, Ch. The question submitted to the consideration of the court is, whether an Ordinary is entitled to hold his office during good behavior, or for four years only, to which it is limited by the Act of 1833.

The very clear view in which Mr. Justice O'Neill, who heard the cause on circuit, has, in his report, presented the question, and the very satisfactory conclusion at which he has arrived, would seem to supercede the necessity of adding more than our entire concurrence. The zeal and confidence, however, with which the appeal has been prosecuted, has given it a consequence which calls for the deliberate judgment of the court, although we may not be able to add any force or strength to the argument contained in the report.

In 1812, (see Acts of that year, p. 35,) the Legislature passed an Act by which the office of Ordinary was limited to the term of four years. Before that time, the Ordinaries held their offices during good behavior, and were elected by the Legislature. But in 1815, (see Acts, p. 55,) the Legisla-

ture, by Act, conferred on the people the power of electing the Ordinary, and prescribed the time, place and manner of holding the elections. The case of *Hays, relator, vs. Harley*, (2 Mills' Const. Rep. 264,) decided in 1817, grew out of these Acts, and it was held by the Court that the Ordinary was a Judge of an inferior court, and entitled, under the Constitution of 1790, to hold his office during good behaviour; and therefore the Act of 1812, limiting the term of office to four years, was void. The amendment of the Constitution, finally adopted in 1828, followed. That provides that all "civil officers whose *authority* is limited to a single election district, a single judicial district, or part of either, shall be appointed and hold their office" &c., "in such manner as the Legislature, previous to their appointment, may provide."

Whatever doubts severe criticism may elicit, from the terms employed in this amendment, as to the intention of the Legislature that adopted it—there is no matter of judicial or legislative history better known, than that it grew out of the decision of the Court, in *Hays vs. Harley*, and some other cases, of the same character, about the same time, and that the leading object was to enable the Legislature to impose such limitation, on the term of the office of Ordinary, as might be thought expedient. A recurrence to the state of legislation, in relation to civil officers whose powers were limited to the district for which they were appointed, at the time the amendment was adopted, leads irresistibly to the same conclusion. Before that, the Legislature had unlimited power as to the mode of appointment and term of office of every district officer, except the Ordinary and Sheriff, whose term of office was limited to four years by the Constitution of 1790; and it cannot be supposed, the terms "all civil officers," would have been employed, if it had been intended to provide only for the case of the Sheriff, and they could apply to no other than the Ordinary. The Act of 1833, limiting the term of office to four years, and the universal acquiescence in it, ever since,

supplies a legislative construction, and the approbation of the community.

Now I do not intend to insist that this is conclusive: that the intention to do an act, however clear and manifest, would stamp on the act itself, a different character from that which it obviously imports: but there is nothing, in the whole circle of human affairs, so well calculated to lead to a correct understanding of a doubtful and equivocal Act, as a knowledge of the object and aim. It is put in requisition in the daily intercourse of men, and is employed as the means of ascertaining the true interpretation of all contracts, compacts, laws and constitutions, as well those relating to the most trivial, as to the most important and solemn subjects.

Having premised thus much, let us examine the amendment, to ascertain whether it does or does not authorize the Legislature to limit the term of office of the Ordinary.

The advocates of this appeal insist on the negative; and they maintain, 1st. That the powers of the Ordinary are purely judicial, and, therefore, he does not fall within the description "civil officers, whose authority," &c.; the term, *authority*, referring to ministerial and not judicial powers. 2d. That he does not come within the description of "civil officers whose authority is limited to a single election district, or judicial district," &c.; because his authority extends beyond the district for which he is appointed. 3d. That the authority, conferred on the Legislature, is to provide for the *manner* of appointing and holding the office, and not for limiting the term of office.

The first proposition is, I think, very fully and fairly met in the report of the Circuit Judge. If, as I have already shown, the object of the amendment was to put it in the power of the Legislature to limit the term of office of the Ordinary, the word "authority" would be idle, unless it means jurisdiction or judicial power; for he exercises no other. That, too, is its grammatical sense. DuPonceau, in his treatise on

Jurisdiction, (p. 21,) says that jurisdiction, in its general sense, is the power to make, declare and apply the law. When confined to the judiciary department, it is what we denominate *judicial power*, and, according to the lexicographers, the term "authority" is often used to express "legal power." (Johnson's Dic., *quarto ed.*) In the Act of 1799, which provides for the establishment of the courts of Ordinary, and to which I shall have occasion to refer more particularly, we have an example, where the word "powers" is used as a substitute for "jurisdiction," as applied to the Ordinary, in which it is provided that he shall exercise "all the *powers* of the court of Ordinary." So that, when applied to the judiciary department, the terms "jurisdiction," "power" and "authority," all mean precisely the same thing.

The Act of 1799 is, in itself, a decisive refutation of the 2d proposition. By that, (after providing for the establishment of courts of Ordinary in each district,) it is declared "that the judges of the said courts of Ordinary shall be chosen by joint ballot of the two houses of the Legislature, which judges shall administer, each in the respective district for which he shall be appointed, all the powers of the court of Ordinary."

Now, it is not pretended that the Ordinary has jurisdiction of causes arising, or of persons residing, without the limits of his district; and the only examples given of his *authority* extending beyond it, are the powers given him, by the Act of 1799, to enforce the attendance of witnesses, (which, although not expressed, may be fairly construed to extend beyond the district,) the power to compel the production of wills that have been suppressed, and a few others of like character. But these are incidents or accessaries to, and not in themselves, substantive judicial powers. They could not be exercised, unless there existed a cause, of which the Ordinary had jurisdiction, and the jurisdiction would, itself, be a nullity, if there was no authority to enforce the attendance of witnesses to procure testimony. In short, without it, there could be no such

thing as a local limited jurisdiction. The jurisdiction of the court of Admiralty is limited to causes arising on the high seas: that of the district courts of the United States, to the State in which they are held; yet they may collect evidence from all quaters, their judgments and decrees are evidence every where, and the operation of their final process, unless otherwise provided, runs throughout the whole extent of the state or kingdom in which they are established; and no one ever yet supposed that their judicial powers were thus extensive.

The third proposition has more plausibility. "Shall be appointed and hold their office," &c., "in such manner as the Legislature may provide," does not necessarily impart the power to regulate the term of office, but rather the *manner* of appointment. In its grammatical construction, however, it refers to both. Now, that the office itself has the right to exercise its powers, and to enjoy its emoluments, is an abstraction which is inaccessible to the physical senses; and to suppose that it was intended, by the amendment, to authorize the Legislature to prescribe the manner of holding it, is irreconcilable with common sense. That it could not have been intended to apply to the mere formula connected with the office is obvious, for over that the Legislature had ample powers. Something else must, therefore, have been intended.

We have before seen that the limitation of the term of office of Ordinary was the leading object of the amendment, of which subsequent legislation and public acquiescence are an imposing construction: that, without that construction, all the leading objects of the amendment must fail; and we have no room to doubt, however inappropriate the term used, it was intended to authorize the Legislature to limit the term of office of the Ordinary.

The motion must therefore be dismissed.

The whole court concurred.

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ABATEMENT (by death.) See *Practice*, 1.

ACCEPTANCE. See *Bills*, 3.

ACTION, FORM OF,

1. Plaintiff baked certain bread, under directions to go on baking until ordered to stop, and told the defendant his bread was ready; the latter refused to take it, saying he did not want it then. The plaintiff's remedy was damages for breach of contract, not an action for goods sold and delivered; and his book entries were not admissible in evidence. *Millar vs. Hilliard & Wade*.....149
2. But if there had been a delivery and acceptance, under a similar order, in a previous transaction not yet settled, that might perhaps constitute a constructive delivery. *Ibid*.
3. A parent has no action for an assault and battery on his child. *Heast vs. Sybert*.....171
4. Trespass *vi et armis* is the proper remedy for a levy under a warrant avoided by the landlord's death, or under a pretence of authority in his administrator. *Bagwell vs. Jamison*.... 249

ACQUIESCENCE.

1. The acquiescence, in a trespass, of one who has been deceived by a pretence of legal authority, is not such consent as to affect his remedy at law. *Bagwell vs. Jamison*.....249
2. Payment to the Sheriff, upon service (without levy,) of an execution void for defect of jurisdiction, is not a voluntary payment. *Murray vs. Moorer*.....111

ADMINISTRATOR. See *Executors and Administrators*.

ADVERTISEMENT. See *Debtor*, 7.

AGREEMENT.

1. Bond, to "keep up and in good repair," a certain bridge, for seven years, "and fully indemnify and save harmless," the Commissioners of Roads for any injury, loss, &c. they might sustain by its deficiency. The obligor was liable for neglect to repair, which occasioned expense *after*, although not during the term. *Commissioners of Roads vs. Austin*.....180
2. And it seems he would have been liable for any expense incurred by the Commissioners in making, during the term, proper repairs which he had neglected. *Ibid.*

See *Frauds*, *stat. of*, 1, 2; *Action*, 1, 2; *Damages*, 3; *Discount*, 6.

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2. And to an action by the Commissioners against the assignee, upon a covenant by the latter, to pay certain liquidated damages, in case of dismissing the apprentice before the expiration of her term, the assignee shall not set up in defence the apprentice's non-performance of her stipulations in the indentures. *Ibid.*

ASSIGNMENT (of indentures.) See *Apprentice*, 1, 2; *Debtor*, 3, 4.

ATTACHMENT.

1. The oath upon which a Magistrate issues an attachment, though it need not be taken in writing, must be recited in the writ. *Devall vs. Taylor*.....5
2. An affidavit in the disjunctive (of one or the other,) of two facts, would be bad to sustain an attachment, though either, positively deposed, might be sufficient. *Ibid.*
3. An affidavit that defendant "is about to remove out of the State personally," will not sustain a domestic attachment. *Ibid.*

ATTORNEY, (liability for neglect.) See *Limitations*, *stat. of*, 1, 2.

AVOWRY. See *Landlord & Tenant*, 1, 2.

BAIL,

1. There being, in this State, no *ca. sa.* against a female, the return of *nulla bona*, upon a *fi. fa.*, is sufficient to authorize proceedings against the bail of a female defendant who has not been surrendered. *Jarvis vs. Alexander*.....143
2. The bail of a female defendant undertake, not only for her appearance, but that she shall abide by and perform the judgment of the court: but they may discharge themselves by a surrender of her person. *Ibid.*
3. Bail to the Sheriff is not converted, by A. A. 1809, into bail to the action for all purposes. *Ibid.*

BAIL, (Commissioner of Special.) See *Debtor*, 1, 2.

BARRATRY.

1. A fraudulent conversion of freight, by one who was both owner and master of the vessel, was not *barratry*—for *barratry* is a fraud against the owner. *Frazier vs. Insurance company*.....123

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The holder, in his action against the acceptor of a bill of exchange, failing to prove the hand writing of the first indorser, was non-suited. *Macfarlane vs. Moses*.....54
2. "Promise to pay as soon as I am in possession of funds to do so from the estate of B." is not a promissory note within the statute. (But *otherwise*, it seems, if the promise had been unconditional, though a particular fund was designated.) *Wiggins vs. Vaught*91
3. A merchant agreed with the payee of a bill, (who promised that certain produce of the drawer's, whose agent he was, should be sent to him,) that he would honor his draft on that condition. The produce was not sent till after the bill had been dishonored and protested, and then only a part, with instructions from the owner to devote the proceeds to other purposes. The payee was non-suited in his action against the merchant, both as acceptor and for money had and received. *Hickman's ex'or. vs. King & Co.*132

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CA. SA. See *Bail*, 1; *Justice of the Peace*, 5.

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1. A coat, ordered by a customer resident abroad, without instructions as to the mode of conveyance, was sent through the stage coach by the tailor, who paid the freight. The coat being lost in transitu, the vendor had his action against the carrier. *Goodwin, Harrington & Co. vs. Douglass*174
2. "Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue; and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the proposition is true, and he will be regarded as having had a constructive delivery made to him from the time the goods are put into the custody of the master or carrier."—*Buller, J. Ibid.*
3. "I do not see why the defendant should object to the plaintiff's action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him."—*Id. Ibid.*

CATAWBA. See *Navigable Rivers*, 2.

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COMMISSIONERS OF SPECIAL BAIL. See *Debtor*, 1, 2.

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1. A promissory note, to the mother of a child who has been beaten, in consideration of not prosecuting, is void. For a parent has no action for an assault and battery on his child. And the note to the mother will not be considered to be for the child's benefit. *Heast vs. Sybert*.....171
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CONVEYANCE. See *Deed*.

CONVICTION. See *Husband and wife*, 1.

CRUELTY, (to Slaves.) See *Negro Laws*, 5.

DAMAGE, (in Transitu.) See *Discount*, 3, 4.

DAMAGES.

1. In case of eviction, the measure of damages, on the covenant of warranty, is the purchase money with interest from the date of the purchase.
 "There is no case of eviction, actually or constructively by paramount title, where the party's right to interest could be defeated by the reception of the rents and profits."—*O'Neill, J. Earle vs. Middleton*.....127
2. The measure of a verdict for breach of contract, should be the damage that the injured party may reasonably have incurred; and the court will not restrain the discretion of the jury unless it clearly exceeds this limit. *Millar vs. Hilliard & Wade*.....149
3. Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages. *Wilson vs. Ferguson*.....190

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1. A Commissioner of special bail has no discretion to discharge, under the prison bounds Act, one who is accused of fraud, &c. He is imperatively required to refer that accusation to a jury. *Arrants vs. Dunlap*.....27
2. The distinction formerly existing in regard to the judicial authority of the Commissioner of special bail in cases of arrest on *meine* and on *final process*, (2 Hill, 433,) is done away by the Act of 1833. *Ibid.*

3. An assignment, by letter, of goods, to indemnify one who had paid money as security, was good against creditors attaching before the letter was received, or the assignment accepted, and took effect from its date. *Dargan vs. Richardson*.....197
4. A debtor inclosed notes &c. to one of his creditors, by letter, with directions to satisfy, first, his own debt, then those of other creditors designated by name. This was a good assignment, as against other attaching creditors, for the benefit of the creditors named. *Shubar & Bunting vs. Winding*.....218
5. Application for relief under the prison bounds Act, being resisted on the grounds that defendant's schedule was false, and that an assignment, (mentioned in the schedule,) of part of his effects was false and fraudulent; the jury found the *assignment* false and fraudulent. *Held* that this was not such conviction of rendering a *false schedule*, as thereafter to exclude the defendant from the benefit of that Act and the insolvent debtor's Act. *Cavan vs. Dunlap*.....241
6. But the defendant was not entitled to his discharge, 'till that action, in which the verdict of fraudulent assignment had been found, was satisfied. *Ibid.*
7. Three months advertisement in a newspaper was sufficient notice, to suing creditors generally, of an application for the benefit of the insolvent debtor's Act. *Ibid.*
8. One of the plaintiffs, a suing creditor, resisting the application for the benefit of the prison bounds Act, was not a competent witness for the other plaintiffs, to prove that the defendant's schedule was false. *Ibid.*

See *Attachment*.

DEED.

1. A sheriff's deed under an execution, which should have conveyed the land of an intestate, but by mistake, purported to convey that of his administrator, was not permitted to pass the land of the intestate. *Murphy vs. Price*.....14
2. A deed without any subscribing witness is not a valid deed to convey land. *Allston et al. vs. Thompson*.....271
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DISCOUNT.

1. The note of plaintiff, payable to one of two joint defendants, was not allowed in discount to an action on their joint note. *Kennedy vs. Cunningham*.....50
2. "To an action by two persons, the defendant cannot set off a debt due to him from one of them, nor can one of several joint

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defendants set off a debt due to him alone from the plaintiff."

Buller, J. Ibid.

3. Damage in *transitu* is a good set-off for freight. *Manning vs. Watson*.....60
4. And delivery to, and acceptance by, the consignee, does not alter the case. (*Semle.*) *Ibid.*
5. Any demand of the defendant, arising *ex contractu*, may be pleaded in discount; but not damages *ex delicto*. *Ibid.*
6. In an action for the purchase money of a lot, purchased after the Rail Road had been constructed through it, a previous agreement in writing not under seal, by the vendor, to convey to the Company a space through of fifty feet, if necessary, and the power to clear a hundred feet on each side, was not allowed to be set up in discount.
Such an agreement was not a covenant for the conveyance of the fee; but only of an easement or right of way. *Williams vs. Oliver*.....115
7. In discount to an action for the purchase money of land, the defendant must make out a valid, subsisting, outstanding, paramount title in another. An agreement to convey a part of the land (or, it seems, even a formal conveyance, if not duly recorded,) will not do. *Ibid.*
8. An incumbrance, of which the purchaser had notice, could not be discounted against the purchase money. *Ibid.*
9. Defendant in assumpsit, offered in discount the value of a quantity of Yarn, delivered to the plaintiff, more than he was entitled to, by mistake and without plaintiff's knowledge. *Held* that the discount could not be admitted. *Broughton vs. Dyson* 208

DISFIGURING.

1. Shaving the mane and cropping the hair from the tail of a mare in the owner's stable, did not constitute the offence of "disfiguring" created by A. A. 1789. *The State vs. Smith*.....157
2. *Quare*, whenever an indictment in the general terms of the A. A. 1789, is sufficient, without setting out the manner of disfiguring. *Ibid.*

DISTRESS.

1. Levy, under a distress warrant, some months after the death of the landlord who had issued it, was a trespass; for the warrant was but a power of attorney, which expired *eo instanti* with the principal's death. *Bagwell vs. Jamison*.....249
2. Executors and administrators may not distrain for rent due at the death of their testator or intestate. The stat. 32 Hen. 8, c. 37, to the contrary, not of force here. *Ibid.*

—— (Illegal.) See *Action*, 4; *Acquiescence*. 1.

ELECTIONS.

1. The District Election Act of 1816 is not absolutely repealed

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- by that of 1839, and was the proper law to govern an election held, after the passage of the new Act, to fill a vacancy which had occurred before it. *The State ex rel. Fox vs. Harmon*.....265
2. Minute irregularities, not affecting the fairness of an election, will not invalidate it. *Ibid.*
3. The day prescribed, by the Act of 1839, for the managers to meet and declare the election, is misprinted in the published Acts, *Monday*. It should be *Wednesday*. *Ibid.*

ELECTION, (of Remedy.) See *Practice*, 6, 7.

ESTOPPEL.

1. Defendant, in trespass, claimed as tenant of S, and adduced evidence to his tenancy and to S's title; but was proved to have entered as plaintiff's tenant, and was, therefore, evicted. This did not conclude him, after having regained possession, from holding under the title of S. *Jones vs. Muldrow et al.*.....254

See *Way, right of*, 3; *Verdict*, 1.

EVIDENCE.

1. The holder, in his action against the acceptor of a bill of exchange, failing to prove the hand-writing of the first indorser, was non-suited. *McFarlane vs. Moses*.....54
2. A deed 35 years old was allowed to go to the jury as evidence, upon proof of the handwriting of the two subscribing witnesses, who were dead, and of its having been duly registered in the proper office. *Edmondston et al. vs. Hughes*.....81
3. After proof of the signatures of the subscribing witnesses, who are dead, "it would seem, that it is not necessary to prove the grantor's handwriting; for his signature, seal and delivery, are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done, it is safest and best to do it."—*O'Neill, J. Ibid.*
4. Upon evidence that an ancient deed had been legally proved before a justice of the peace, and registered; "If there were no other circumstance in this case, I should say that that warranted the judge in sending a deed, 35 years old, to the jury."—*Id. Ibid.*
5. A copy of the newspaper in which a libel was published, with proof of defendant's acknowledgment that he had handed it to the editor for insertion, was proper evidence of publication. *Woodburn vs. Miller*194
6. Defendant, in libel, had charged the plaintiff with having falsely accused him of crime. On trial, defendant gave proof, in mitigation, of the falsehood of the accusation; plaintiff was entitled to reply with evidence of its truth. *Ibid.*
7. In an action on the case for obstruction of a private way, a verdict, of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it in a

EVIDENCE, (continued.)

- subsequent action between the same parties. *Prather vs. Owens*..236
8. *Quere*, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants, entitled to rent, may give special matter in evidence under the general issue. *Bagwell vs. Jamison*.....249
9. In trespass against a bailiff, for levying under a distress warrant alledged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgments by the landlord, deceased, of partial satisfaction, were admitted in reply. *Ibid*.
10. Where it does not fully appear, by the record, what was the precise issue submitted to the jury, evidence will be admitted for the purpose of ascertaining the scope of their verdict. *Jones vs. Muldrow et al.*.....254
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- See *Slave*, 1; *Witness*, 4, 5, 6, 7; *Malicious prosecution*, 1; *Negro Laws*, 1.

EXECUTORS AND ADMINISTRATORS.

1. Executors and administrators may not distrain for rent due at the death of their testator or intestate. The stat. 32. Hen. 8, c. 37, to the contrary, not of force here. *Bagwell vs. Jamison*.....249
2. Avowry, by an Administratrix, for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. Held that no further title need be shewn, and a verdict for the avowant was right. *Morehead vs. Barrett*.... 99

EXEMPTIONS. See *Jury*; *Roads &c.* 2, 5, 6, 9, 10.

FEMALE, (bail of.) See *Bail*, 1, 2.

FISHERY.

1. Occupation of a spot for five or six weeks annually as a fishing place, is not possession sufficient for the Statute of limitations. *Jackson vs. Lewis et al.*.....259
2. Defendant, in trespass for a fishery, under the plea of *liberum tenementum*, shewed a title in common with G.; but plaintiff proved an elder title. G's testimony was then offered, to prove defendant's right by prescription to fish:—objected to for interest, as tenant in common, but held competent. *Ibid*.

FOREIGN JUDGMENT. See *Justice of the Peace*. 2, 3, 4.

FRAUD. See *Debtor*, 1.

FRAUDS, STATUTE OF.

1. An entry in a broker's sale book, with the consent of both parties, of the terms of an agreement for the sale of land, if not in itself a sufficient memorandum under the statute of frauds, may be so connected with a subsequent letter from the vendor, in reference to it, as to make it good against him. *Toomer vs. Dawson*.....68
2. "I am, however, far from conceding that the memorandum, made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both."—*Buller J. Ibid*.

HIRED SLAVES. See *Roads &c.*, 1, 2, 3.

HUSBAND AND WIFE.

1. Upon a joint indictment, under A. A. 1740, sec. 37, (P. L. 173,) against husband and wife, the former was acquitted, and the latter convicted and fined. The husband was held not to be liable for the penalty imposed on his wife. *The State vs. Montgomery et ux*.....120
2. Where a settlement of real estate was made to the use of husband and wife, during their joint lives, then to the use of the survivor for life, with limitations over, the surviving widow took a freehold estate for life. *Cleary vs. McDowall et al.*.....139
8. Where a woman, seized of a freehold in land for life, married, and during the coverture, the land was levied on and sold under an execution against the husband, who afterwards died, the widow surviving; held that the purchaser only took an estate for the life of the husband, and at his death, the widow was entitled to the remainder of her estate. *Ibid.*

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1. Two distinct offences, with different penalties, may be charged in the same indictment; but care must be taken to have the verdict framed so as to secure the several counts. *The State vs. Priester*..103

See *Negro Laws*, 2, 3, 4.

2. An indictment for stealing twenty-five head of cattle—against A. A. 1789—having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered. *The State vs. Windham*.....75
3. If the objection had been made in time, the Circuit Judge, (BUTLER, J.) would have sent the jury back to amend their verdict. *Ibid.*

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JURISDICTION.

1. Plaintiff in sum. pro., having sustained his whole claim, *prima facie*, defendant's testimony reduced it to \$15, and the judge decreed for the plaintiff to that amount. Decree reversed and nonsuit ordered. *Sanders vs. Gage, ex'r*.....165

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1. A commissioned officer in the United States Navy, is not exempt from Jury service. *The State vs. Ingraham*.....78
2. All previously existing exemptions are virtually repealed by the Jury Law of 1799. *Ibid.*

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1. Proceedings before an inferior court are void unless they carry upon their face the evidence of jurisdiction; and, therefore, the oath upon which a magistrate issues an attachment, though it need not be taken in writing, must be recited in the writ. *Devall vs. Taylor*.....5
2. The Judgment of a Justice's Court of another State is entitled to "full faith and credit" here, as a judicial proceeding, and is a good ground of action. *Lawrence vs. Gaultney*.....7
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LANDLORD AND TENANT.

1. Avowry, by an administratrix, for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. Held that no further title need be shewn, and a verdict for the avowant was right. *Morehead vs. Barrell*.....99
2. A landlord is not bound to set out, in his avowry for rent in arrear, any further title than the lease under which his tenant entered and held the premises. *Ibid.*
3. The Statute 11 Geo. II. c. 19, though not expressly made of force in this State, has been adopted in practice. *Ibid.*
4. The possession of a tenant, holding under an ancestor, inures to the heir, and constitutes a continuous possession for his benefit.—*Williams et ux. vs. McAiley*.....260
5. The tenant, of a landlord who died before completing his title by possession, cannot hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another. *Ibid.*
6. *Quære*, whether so much of Stat. 11 Geo. II, c. 19, is of force here, as provides that defendants entitled to rent, may give special matter in evidence under the general issue. *Bagwell vs. Jamison*. 249
7. In trespass against a bailiff, for levying under a distress warrant alleged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgements by the landlord, (deceased,) of partial satisfaction, were admitted in reply. *Ibid.*

See *Estoppel*, 1; *Limitations*, Stat. of, 5, 6.

LIBEL.

1. "A report has gone abroad, through the instrumentality of S. W. stating that R. M. had a load or parcel of falsely packed or plated cotton bales; which report is a direct falsehood." This, printed and published, with malice, was a libel. *Woodburn vs. Miller*.....194

See *Evidence*, 5, 6.

LIMITATIONS, (STATUTES OF.)

1. Assumpsit, against an Attorney, for negligent delay, whereby a debt was lost, though brought as soon as the loss could be definitely

LIMITATIONS, STATUTES OF, (continued.)

- ascertained, was barred by the statute of limitations; the actual neglect and circumstances of the debtor which rendered the loss probable, having existed four years previous. *Ex'rs. of Thomas vs. Ex'rs. of Ervin*.....22
2. And the damage subsequently accruing did not constitute a fresh cause of action. *Ibid.*
3. Defendant's admission that "he was willing to settle, and to pay any thing that might be due on a fair settlement; but he thought he had paid plaintiff enough," did not prevent the bar of the statute of limitations. *Hughes vs. Hughes*.....33
4. The purchase of one's land at sheriff's sale, with an agreement that he shall remain in possession and refund the money at an indefinite period, does not create a continuing trust to bar the statute of limitations. *Ibid.*
5. The possession of an heir, in land, attaches to and is continuous with that of his ancestor, for the purposes of the statute of limitations. *Williams et ux. vs. McAliley*.....200
6. The possession of a tenant, holding under an ancestor, inures to the heir, and constitutes a continuous possession for his benefit. *Ibid.*
7. The tenant, of a landlord who died before completing his title by possession, cannot hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another. *Ibid.*
8. Plaintiff in trespass, a minor, had acquired a title, by possession of part of a tract, with colour of title to the whole; but, before her statutory right was matured, the defendant, also with colour of title, had settled on part of the same tract, and kept possession for many years. Defendant's title was good, to the extent of his actual occupation before the maturity of plaintiff's right; for it is the right, and not the unauthorized possession of a minor, that is protected from the operation of the statute of limitations. *Ibid.*
9. Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations. *Jackson vs. Miles et al.*.....269

MAGISTRATE. See *Justice of the Peace; Attachment.*

MALICIOUS PROSECUTION.

1. A "true bill" found, constitutes a presumption of probable cause for the prosecution, and a plaintiff in an action for malicious prosecution, who had proved his general good character and defendant's malice, was yet non-suited for want of express evidence to rebut this presumption. *Brown vs. Griffin*.....32

See *Pleading*, 1, 2.

MILITIA LAWS.

1. Where a militia execution, (under the A. A. 1835, p. 18,) directed the Sheriff to levy a certain percentage on the general tax of

MILITIA LAWS, (continued.)

- a delinquent, the Sheriff was bound to ascertain the amount and collect it. *Seastrunk vs. Rice*.....71
2. The Sheriff is not entitled to any fee, on a militia execution under the A. A. 1835, except where the fine has been collected, *Ibid.*

MINOR. See *Limitations, Stat. of*, 8.

MISNOMER.

1. After a prisoner has pleaded not guilty, he may not avail himself of misnomer in the indictment, either on his trial, or in arrest of judgment, or on motion for a new trial. *The State vs. Thompson*...31
2. An indictment (under A. A. 1817 and 1834.) for selling liquor to the slave of William Patton, charged the selling to have been without "a written order of or from the said William Boice," (instead of Patton, the owner,) "or of or from any other person having charge or management of said slave. After verdict of conviction, judgment was arrested. *The State vs. Boice*.....77

MONEY HAD AND RECEIVED. See *Bill of Exchange*, 3; *Pleading*, 17, 18.

MURDER.

1. A slave having been convicted, by a court of Magistrates &c., of Christ Church, of the murder of a slave, who received the mortal injury in that parish, but died in another, in the same district; execution of the sentence was arrested by prohibition. *The State ex rel. Matthews vs. Toomer et al.*.....106
2. The A. A. 1793, (1 F. 393; 5 Stat. So. Ca. 231,) providing, in case of mortal injury inflicted in one county or district, and death ensuing in another, that the trial shall be had where the death occurred, extends to the case of homicide of one slave by another. *Ibid.*
3. In the case of offences cognizable by a parish magistracy, the principle of the Act is applicable to the separate parish jurisdictions, though in the same district. *Ibid.*
4. The A. A. 1832, Sec. 2, p. 60, concerning the trial of slaves, seems to be only of special application to the city of Charleston. *Ibid.*

NAVIGABLE RIVERS.

1. Law of *Navigable Rivers* considered. *Jackson vs. Lewis et al.*.....259
2. *Quere*, whether the *Catawba*, in Chester district, is a navigable river. *Ibid.*
3. *Quere*, whenever an unnavigable channel, severed by an island from the main stream of a navigable river, be subject to grant. *Ibid.*

NEGRO LAWS.

1. In an action for a penalty, under a City Ordinance against negroes being permitted to assemble or loiter in any shop longer than while actually engaged in lawful trading, proof that negroes remained for two hours in and about the defendant's premises, threw

NEGRO LAWS, (continued.)

- on him the burthen of shewing that they were not there unlawfully. *City Council vs. Brandt*72
2. One count, in an indictment, charged the *buying of corn* from a slave, another the *selling of liquor*. The defendant, who was not a vendor of spirits by profession, had traded the liquor for the corn. A general verdict of guilty was held good; for the two counts charged the same offence. *The State vs. Priester*.....403
3. It seems that it would have been otherwise, had the defendant been a distiller, vendor, or retailer by profession; for then, the offence in the *second* count would have been that created by A. A. 1834, while the first charged a violation of the A. A. 1817. *Ibid.*
4. The words "distiller, vendor, or retailer," in the A. A. 1834, refer only to distillers, &c., by profession or habitual practice. *Ibid.*
5. Any cruel beating of a slave is punishable under the negro Act of 1740, sec. 45, whether of the same grade of cruelty with the instances specified in the Act, or not. *The State vs. Wilson*.....103

NEW TRIAL.

1. Where an obvious arithmetical error, in a discount specially pleaded, was corrected by the jury, so that the discount allowed was greater than that claimed by the plea, the court would not set aside the verdict. *Richardson vs. Murray*.....11
2. An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486; 5 Stat. So. Ca. 139,) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered. *State vs. Windham*76
3. The expense, both of a full trial and of an appeal, having accrued from a non-suit being improperly refused below, the Court exercised the discretion of ordering, instead of a non-suit, a new trial with leave to the plaintiff to amend. *Wiggins vs. Vaught*91

ORDINARY.

1. The term of office of *Ordinaries*, is subject to be limited by Act of the Legislature, and is now limited, by A. A. 1833, to four years. *The State ex rel. Bronson, vs. Hunter*288

PARENT. See *Action*, 3; *Consideration*, 1.

PARTNERSHIP.

1. To charge a firm with money borrowed by a partner, it is enough that the borrowing was on the credit of the firm, whether for its use, or not. *Steel vs. Jennings & Beatty*.....183

PLEADING.

1. In an action for malicious prosecution, a declaration, "alleging that the plaintiff was arrested, entered into recognizance, and was "afterwards therefrom discharged, and that the prosecution was wholly ended and determined," is not sustained by proof of acquittal before a petit jury. *Law et ux. vs. Franks*.....9

PLEADING, (continued.)

2. The word 'discharged' is not equivalent, in pleading, to 'acquitted,' which term alone expresses a discharge upon trial *per pais*. *Ibid*.
3. The court will not hear a motion to amend a declaration after the case has gone to the jury, and is arrested by a nonsuit. *Ibid*.
4. The declaration averred an assault on the plaintiff "while sitting in his gig." The replication represented the defendant in the gig, "and the plaintiff gently laid hands on him to put him out," and then the assault;—held not to be a departure; for both allegations, though apparently discrepant, might be true, as they did not necessarily refer to the same exact point of time. *Macfarland vs. Dean*.....64
5. Plea to assault and battery, *son assault demene*; which the replication confessed and avoided. The rejoinder substantially reiterated the plea, and was held bad for not traversing the replication. *Ibid*.
6. Approved precedents are to be followed, and a rejoinder wantonly deviating therefrom, held bad. *Ibid*.
7. The effect of a judgment in special demurrer is, only, that the party cast shall plead over, or amend on payment of costs; so, his demurrer having been overruled, to a rejoinder concluding to the country, he should be allowed to add the similiter and go to trial. *Ibid*.
8. "I am not prepared to hold, that a judgment for the defendant in demurrer as to one count in the declaration, would deprive the party of a right to judgment, on a verdict found on the other counts."—(*O'Neill, J.*) *Ibid*.
9. Writ served on two, and declaration against only one of them, is a variance fatal on special demurrer. *Fitch vs. Debrahl*.....185
10. On a cause of action, several, as well as joint, plaintiff may discontinue as to the rest, declaring against one, by leave of court, but not otherwise. *Ibid*.
11. *Sum. Pro.* brought in the mercantile name of a firm, without setting out the partnership, or the christian names of the partners, would have been bad upon exception by plea; but not on motion for nonsuit. *Martin & Cornwell vs. Kelly*.....215
12. On the joint and several note of a man and his wife, a writ was issued against both as separate persons. It seems that the declaration against husband alone, suggesting the relation of the parties, would have been good; but, for want of such suggestion, it was bad on special demurrer. *Cozens & Brothers vs. House*.....233
13. *Quere*, whether, on special demurrer, such variance would defeat the action, or only put the plaintiff to amend. *Ibid*.
14. Such variance is not the subject of a motion for non-suit after plea; for the plea has denied the declaration without reference to the writ. *Ibid*.
15. "Unto and into a certain highway, which runs near where the said plaintiff resides," is a sufficient description of the *terminus ad quem*, in a declaration in case for obstruction of a private way;

PLEADING, (continued.)

- at any rate, it is good after verdict. *Prather vs. Owens*.....236
16. *Quere*, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants, entitled to rent, may give special matter in evidence under the general issue. *Bagwell vs. Jamison*.....249
17. The general count for money had and received, in an action upon an interest-bearing demand, carried interest. *Marvin vs. M' Rae*.....61
18. "It was not necessary to count upon the interest, for it is an incident of money had and received, and does not depend upon an express promise." *Ibid.*
19. A conditional promise having been declared on as a promissory note, exception was properly taken, by motion for non-suit, after general issue pleaded. *Wiggins vs. Vaught*.....91
- See *Discount; Action; Bill of Exchange*, 3. *Estoppel*, 1; *Landlord and Tenant*, 1, 2, 4; *Misnomer*, 1, 2; *New Trial*, 1, 2; *Negro Laws*, 2, 3; *Slander*, 1, 2, 3.

PRACTICE.

1. The order for judgment, indorsed by the Clerk upon the record, is an 'interlocutory judgment,' as contemplated by the Act of 1746, 'for preventing the discontinuance of process and abatement of suits;' and after such order had, an action within the provisions of that law, will not abate by the death of a party. *Dubose vs. ad'mr. of Dubose*.... .29
2. The foreman of the jury, in a slander case, who had used like words of the plaintiff, to those on which the action was brought, was excused, against the defendant's consent, from sitting on the trial; and the defendant was not permitted, on that account, to continue his cause. *Palmer vs. Bogan*.....52
3. The court will not hear a motion to amend a declaration, after the case has gone to the jury, and is arrested by non-suit. *Law et ux. vs. Franks*.....9
4. An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486.) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered.
If the objection had been made in time, the judge on the circuit (Butler, J.) would have sent the jury back to amend their verdict. *The State vs. Windham*.....76
5. The expense, both of a full trial and of an appeal, having accrued from a non-suit being improperly refused below, the court exercised the discretion of ordering, instead of a non-suit, a new trial with leave to the plaintiff to amend. *Wiggins vs. Vaught*..91
6. A plaintiff, who had gone into both courts upon the same demand, being put to his election, chose to proceed in equity. Motion, by his attorney, that his case at law be continued, was refused: he had to take a non-suit and pay costs. *Napier & Co. vs. Gidiere, ex'or*.....101
7. *Quere* as to costs, if he had proceeded in the proper form of a retraxit; for which purpose, he must have appeared in person, not

PRACTICE, (continued.)

by attorney. But a retraxit is a renunciation of the whole cause of action, and it is doubtful whether the plaintiff could afterwards have proceeded even in equity. *Ibid.*

8. In an action of trespass on the case, involving a right to water privileges, the defendant's motion for a survey was granted, though the plaintiff declined to join. *Scriven vs. Heyward*.....119
9. A motion for a rule of suavey, which the Court would not have hesitated to grant, having been refused, in courtesy to the judge who had rejected the same application at the previous term, an appeal upon the motion was allowed, *pendente lite*. *Ibid.*
10. Where there was a variance between a judgment and execution, and the Sheriff's deed under them; if, the error were in the judicial records, then the Court might allow them to be amended; but otherwise, where the mistake was in the Sheriff's deed, which is matter in *pais*. *Murphy vs. Price*.....14
11. When it is doubtful whether a non-suit ought to be ordered, the judge, on circuit, will sometimes, even against the inclination of his judgment, send the case to the jury. But the Appeal Court will not be restrained, by a verdict for the plaintiff, from opening the entire evidence to decide on the motion for non-suit. *Hickman's ex'or vs. King & Co*.....132

See *Attachment; Jurisdiction; Justice of the Peace; New Trial; Pleading*, 10, 11; *Trover; Witness*, 1 to 7.

RAIL ROAD. See *Roads*, 2.

REMEDY, (at Law.) See *Action*, 1, 2, 3. *Acquiescence*, 1.

REPLY. See *Evidence* 5, 9.

RETAILING.

1. License to keep a tavern includes the privilege of retailing spirituous liquors. *The State vs. Chamblyss*.....220

RETRAXIT. See *Practice*, 7.

RIVERS. See *Navigable Rivers*.

ROADS, &c.

1. Where slaves, hired by the month, had been employed the greater part of the year by the same person, in working on the Rail Road, the hirer was properly held accountable, by the Commissioners, for their road service in the parish in which they were so employed. *The State ex rel. Luten vs. Commissioners Roads*.....95
2. Hands working on the Rail Road, (though by law a public highway,) are not exempt from ordinary road duty. *Ibid.*
3. The road duty of hired slaves is due at the place where they have resided and worked the greater part of the year. *Ibid.*
4. In what instances the hirer of slaves, or the owner, should be made liable for their road service, cannot be indicated by any precise rule, but must depend on circumstances to be judged of by the Commissioners. *Ibid.*
5. Persons required by law to work on *Watt's Cut*, (Edisto Island.)

ROADS, &c. (continued.)

- are not exempt from ordinary road duty. *The State ex rel. Jenkins vs. Commissioners Roads*.....109
6. The road Act of 1825, (A. A. p. 29,) repeals all previously existing exemptions. *Ibid.*
7. The Commissioners of roads have power to impose and collect fines of \$20, but no more. *Ibid.*
8. The Commissioners are authorized (A. A. 1825, sec. 12,) to assess, in certain cases, to a large amount, but no mode of collecting is prescribed. *Ibid.*
9. *Post Misters* are not exempt from road duty. *The State ex rel. Campbell vs. Commissioners Roads*.....210
10. *State vs. Harrington*, 2 M'C. R. 400, and *State vs. Martindale*, 1 Bailey R. 163, considered. *Ibid.*

SET OFF. See *Discount*.

SHERIFF.

1. A fine of \$60 having been paid to the Sheriff, upon presentation, without levy, of an execution issuing from a Board of Commissioners of Roads, the Sheriff, who had the money still in his hands, was liable to an action of *indebitatus assumpsit* for the excess over \$20, (the limit of the Commissioners's jurisdiction. See *Supra*, p. 109.)
- And, it seems, it would not have been otherwise, if the Sheriff had paid over the money. *Murray vs. Moorer*.....111
2. Payment to the Sheriff, upon service, without actual levy, of an execution void for defect of jurisdiction, is not a voluntary payment. *Ibid.*

SLANDER.

1. In an action of slander, words affecting the pecuniary credit of a merchant need not be averred nor proven to have been used in relation to his occupation as a merchant; for, in their nature, they strike at the root of mercantile character. *Davis vs. Ruff*.....17
2. Plaintiff in slander, who participates in the risks of a mercantile concern, but does not share in the profits, shall not recover for injury to his character as a merchant, without shewing special damage. *Ibid.*
3. It is no slander of a *firm*, to say that one of the partners is broke. The right of action on such words accrues to the individual. *Ibid.*
4. A verdict in slander, although much larger than the discretion of the court would have awarded, will not be disturbed on that account alone. *Ibid.*

See *Practice*, 2.

SLAVE.

1. The defendant's Steamboat being about to run foul of that of the plaintiff, a slave of the latter was mortally injured in an attempt to prevent the collision. Some shewing was made by the defendant, that the negro had wantonly exposed himself to the danger; but the jury were instructed that such presumption ought not to

SLAVE, (continued.)

be admitted, in the case of a slave protecting his owner's property, without clear proof. *Ivy vs. Wilson*.....74

See *Murder*; ———(trading with,) *Misnomer*, 2; ———(cruelty to,)

Negro Laws, 5; ———(hired,) *Roads &c.* 1, 3, 4.

SOUNDNESS, WARRANTY OF.

1. The defendant, a free colored man, purchased an unsound slave who had been his wife, at a price greater than her sound value, although well aware of her unsoundness, and warned of it by the owner. It was a binding contract, and the verdict of a jury to the contrary was sent back. *Lyles vs. Bass*.....85
2. The purchaser of a negro had notice of his having a shortness of breath, which was attributed to a severe fall. It turned out, afterwards, that his lungs must have been dangerously diseased at the time of sale; though there was no appearance of unfairness or concealment. *Held* that there was not sufficient notice to relieve the vendor for a sound price from his implied warranty. *Venning vs. Gantt*.....87
3. The sufficiency of notice of unsoundness, where it is equivocal, is a point for the jury to determine. *Ibid.*
4. An express warranty of soundness, in the bill of sale of a negro, precluded the implication of warranty of other representations on the same paper; as, that the negro was forty years old. *Stucky vs. Clyburn*.....186
5. A written warranty cannot be limited by parol evidence, (as, of purchaser's knowledge of a defect,) unless unintelligible without it. *Ibid.*
6. A *hernia*, known to the buyer of a negro, was not one of those "defects that are plain and obvious to the senses of the purchaser, and required no skill to detect them," and which are not covered by an express warranty of soundness. *Ibid.*
7. As to such obvious defects as are excepted from the scope of an express warranty, "I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness."—*Evans, J. Ibid.*
8. A warranty of soundness given after the completion of a sale, being *under seal*, could not be impeached for want of consideration. *Wilson vs. Ferguson*.....190
9. Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages. *Ibid.*
10. A swelling in the abdomen of a negro woman, plainly visible, and known to the purchaser, it seems was no exception to the general scope of an express warranty of soundness; though no ill consequences were shewn from the malformation, and the woman did full work. *Ibid.*

SUBSCRIBING WITNESS. See *Deed*, 2, 3.

SUM. PRO. See *Jurisdiction*.

SURETY.

1. A surety on a note, who has let judgment go by default, and has paid the debt, has recourse upon his principal for indemnification, notwithstanding that the latter, who was sued at the same court, by defending the case, obtained a decree in his favor. But, *semble*, not if he had been notified of the defence. *Stinson vs. Brennan, adm'r.*15

SURVEY. See *Practice*, 8, 9.

TAVERN. See *Retailing*.

TROVER.

1. A writ in Trover cannot be served, under the provisions of the Act of 1827, in any other district than that to which it is returnable. *Nesbit vs. M^r Daniel*.....12
2. It is the intention of that Act that the taking of the bond, &c., therein prescribed, shall be *after* action brought by service in the usual way. *Ibid.*

VARIANCE, (in pleading.) See *Pleading*, 4, 9, 10, 12, 13, 14.

—Between execution and sheriff's deed under it—see *Practice*, 10.

VERDICT.

1. A point on which evidence has been given, on the trial, but on which, in consequence of what afterwards appears, the party is not permitted to rely, is not concluded by the verdict. *Jones vs. Muldrow et al.*.....254
2. Where it did not fully appear, by the record, what was the precise issue submitted to the jury, other evidence was admitted for the purpose of ascertaining the scope of their verdict. *Ibid.*

See *Way*, 3; *Evidence*, 7, 10.

WARRANT. See *Distress*, 1.

WARRANTY. See *Soundness*.

WATT'S CUT. See *Roads, &c.*, 5.

WAY, RIGHT OF.

1. The mere use of a way over uninclosed land, will never ripen into a presumption of right; but a prescription might have grown upon implied assertions of the right on the one part or admissions on the other. *Sims vs. Davis et al.*.....1
2. The contrary opinion in *Roland vs. Wolfe*, [1 Bailey R. 56.] and in *Garret vs. M^r Kee*, (1 Bailey R. 341) reviewed. *Ibid.*
3. In an action on the case for obstruction of a private way, a verdict of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it, in a subsequent action between the same parties. *Prather vs. Owens*.....236

See *Pleading*, 15.

WILL.

1. A will legally executed shall not be set aside on the mere ground that its provisions are in favor of a mulatto woman, with whom the testator, a hard drinker and paralytic, had lived in disgraceful intimacy; who had had great domestic influence over him, and of

WILL, (continued.)

- whom he had sometimes appeared to be in personal fear. *Farr et al vs. Thompson, ex'or.*.....37
2. There must be proof, not only of influence, but, that it had been expressly and unlawfully brought to bear upon the will. *Ibid.*
 3. A disposition of property, though ever so capricious and unreasonable, will not be avoided on that ground alone. *Ibid.*
 4. "What facts, if proved, shall constitute undue or improper influence, to avoid a will, I hold to be a question of law: and I think in cases of this kind, the particular sort of influence should be set down in the pleadings." (*Earle, J.*) *Ibid.*

WITNESS.

1. A witness attending upon a subpœna ticket alone, without writ, is entitled to his fees from the party cast in the suit. *Johnson vs. Wideman*26
2. Where the successful party has paid witnesses subpœnaed on both sides, who had already been paid, without his knowledge, by his defeated adversary, he shall, nevertheless, have their fees taxed against the latter. *Ibid.*
3. And the party cast may recover at law, from the witnesses, not what he paid, but what they fraudulently received from the other party, to his damage. *Ibid.*
4. The rule, that one shall not discredit his own witness, is for the protection of the witness himself, and shall not be dispensed with by consent of the parties litigant. *Farr et al. vs. Thompson, ex'r.*....37
5. And the rule excludes, not only general evidence against the character, but former inconsistent declarations; and every matter that would be inadmissible or irrelevant, except for the purpose of impeaching the credit. *Ibid.*
6. But a party may introduce contradictory evidence upon facts material to the issue, and thus incidentally impeach the credit of his own witness; and this will not let in evidence of good character in reply. *Ibid.*
7. Where, however, a party was, irregularly, allowed to introduce the inconsistent declarations of his own witness, evidence of character ought to have been admitted in reply. *Ibid.*
8. In an action on a policy of insurance of freight lost *in transitu*, the patroon, who was also owner of the boat, was not a competent witness to shew that the freight was lost by fire, so as to fix the liability of the insurers. *Frazier vs. Insurance company*.....123
9. One of several plaintiffs, suing creditors, resisting an application for the benefit of the prison bounds Act, was not a competent witness for the other plaintiffs, to prove that the defendant's schedule was false. *Cavan vs. Dunlap*.....241
10. Defendant, in trespass for a fishery, under the plea of *liberum tenementum* shewed a title in common with G.: but plaintiff proved an older title. G's. testimony was then offered to prove defendant's right by prescription to fish—objected to for interest, as tenant in common, but held competent. *Jackson vs. Lewis et al.*..259

— (Subscribing.) See *Deed*, 2, 3.

CASES IN CHANCERY,
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

Volume 1.

FROM NOVEMBER, 1839, TO MAY, 1840, BOTH INCLUSIVE.

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CASES IN CHANCERY,
ARGUED AND DETERMINED IN
THE COURT OF APPEALS
OF
SOUTH CAROLINA,
AT
COLUMBIA, FALL TERM, 1839.

CHANCELLORS PRESENT.*

Hon. DAVID JOHNSON,
Hon. JOB JOHNSTON,
Hon. B. F. DUNKIN.

*Beverley Burton vs. Geo. W. Pressly, Adm'r. of S. Pressly,
and Wm. H. Moss.*

If a new note were given in payment of an old one secured by mortgage, the mortgage must have fallen with the note on which it was founded: but *otherwise*, where for mere convenience a new note was executed to take the place of the old one; the object being *substitution* and not *payment*.

What alterations on the face of an obligatory written instrument will avoid it, and under what circumstances.

This case was heard (at Edgefield, June, 1839,) by Chancellor JOHNSTON, who delivered the following decree:

JOHNSTON, Ch. It appears that the plaintiff, being indebted to the late Dr. Samuel Pressly, in the sum of 5,565 dollars and 11 cents, by sealed note, dated the 1st of January, 1833,

* Chancellor HARPER absent, by leave of the Legislature.

and due at one day after date, did, on the day of the date of said note, or on the succeeding day, in consideration of said debt, and in order to secure the payment of the same, execute a mortgage to the said Dr. Pressly:—which mortgage now reads as follows:

"SOUTH CAROLINA, }
Edgefield District. }

Know all men by these presents, that I, Beverly Burton, of the State and District aforementioned, for and in consideration of the sum of five thousand five hundred and sixty-five dollars, 11 cts., to me paid by Samuel Pressly, of the State above mentioned, and Abbeville District, have granted, bargained, sold and released, and do by these presents, grant, bargain, sell, and deliver, unto the said Samuel Pressly, all my real and personal estate, namely, the tract of land on which I now live, containing four hundred acres, more or less. Also, the following negroes, now in my possession, to wit: Edward, Daniel, Leah, Stephen, Sucky, Lark, Rynah, Burton, *young Lark*,* Bidddy, Ansel, Silvey, and *Leith*, with their future issue. Also, all my horses, cattle, hogs, sheep, and oxen, with their future increase. Also, my wagon, cart, household and kitchen utensils, plantation tools, &c.

Together with all the rights, members, and appurtenances, the above mentioned property belonging or appertaining thereto. To have and to hold all and singular the above mentioned property, unto the said Samuel Pressly, his heirs and executors and assigns, forever. Provided, nevertheless, and upon condition, that if the said Burton, his heirs or assigns, shall well and truly pay, or cause to be paid, unto the said Pressly, his heirs or assigns, the sum of five thousand five hundred and sixty-five dollars 11 cents, *on or before the 1st of January next*, being the amount of a note of hand

* The words in italic are interlined in the original.

given this day, and bearing interest, given to the said Pressly, *interest to be paid annually*, then, and in such case, and at all times from thenceforth, these presents, and all the above mentioned property granted, and every article and clause above contained, shall be null and void to all intents and purposes, otherwise, to remain in full force and virtue, in law. Signed, sealed, and delivered, in the year of our Lord one thousand eight hundred and thirty-three. Witness my hand and seal, this *2nd January*, 1833.

BEVERLY BURTON, (L. S.)

Test, Allen Burton,
Mary Ann Burton."

The following is endorsed thereon :

"SOUTH CAROLINA, }
Edgefield District. }

Personally came before me, Allen Burton, and being duly sworn, saith that he was present and saw the within named Beverly Burton, sign, seal, and deliver the within mortgage, for the uses and purposes therein mentioned, and that he did see Mary Ann Burton sign her name with himself, in presence of each other, as above mentioned. *Also to the interlining within.* Witness the same, sworn to this 14th October, 1834.

ALLEN BURTON.

Before me, Peter Quattlebaum."

Endorsed is also a certificate of recording by the Secretary of State, at Columbia, dated Nov. 25, 1834.

It appears further that Doctor Pressly, the mortgagee, executed to Mr. Burton, the mortgagor, the following counterpart:

"I, Samuel Pressly, have this day received a mortgage of Beverly Burton, on his real and personal property, namely, the tract of land that he now lives on, containing four hundred acres, more or less, and eleven negroes, Stephen, Sukey, Ned,

Daniel, Lark, Riner, Burton, Young Lark, Biddy, Ansel, Silvy; and also, his stock of cattle, hogs, sheep, household and kitchen furniture, and plantation tools; to secure a debt that he owes to me to the amount of five thousand five hundred and sixty-five dollars, for which I hold his note for; and I, Samuel Pressly, do bind myself, my heirs, executors or administrators, to wait for the above mentioned debt eight or ten years; by the said Beverly Burton paying or causing to be paid from four to seven hundred dollars annually, *with the interest*, and the first payment to commence the next January, twelve months *after date*; and Burton is at liberty to kill and use any part of his stock for the use of his family; and the said Beverly Burton is fully authorized to sell or dispose of any part of the above mentioned property, or all, either by private or public sale, so that the said Burton applies or causes to be applied the effects, to the above mentioned debt; or a sufficiency of the effects to settle the above mentioned debt. I, Samuel Pressly, do bind myself to take any good note or notes, due or not due, by allowing the legal interest until due, and give the above mentioned debt credit for the amount of note or notes. Witness my hand and seal this the

January 1st, 1833.

SAMUEL PRESSLY.

Allen Burton."

The plaintiff, after setting forth in his bill the execution of the foregoing instruments, states that he complied with the terms of the counterpart "as far as permitted by the acts of said Samuel Pressly, and to the entire satisfaction of the latter."

That in 1834, the sheriff having executions against the plaintiff, sold 4 slaves belonging to him, "two of whom, *Leah* and *Leith*, were included in the mortgage;" and Dr. Pressly having become the purchaser, the plaintiff paid him for them, and took from him the following receipt:

"Received of Beverly Burton \$669, in full for Ned, Easter, Leith, and Leah, bought at sheriff's sale by me, and sold to said Burton, Dec. 2, 1834.

SAMUEL PRESSLY."

That in 1835, the said Pressly removed to Alabama, where he thenceforth resided till his death; which took place a short time before the filing of the bill.

That in 1837, the said Pressly being in this State, *a settlement* was made between him and the plaintiff as regards the principal and interest due; in which settlement *the plaintiff paid him a considerable sum of money, and gave him two notes of hand*; and that the original note on which the mortgage was founded, "was delivered up, and is in the plaintiff's possession:—*by which delivery*" (the plaintiff insists) "*the said mortgage was discharged, and was no longer binding.*"

That upon the death of the said Samuel Pressly, (the mortgagee,) the defendant, Geo. W. Pressly, became his administrator in this State; and "notwithstanding his intestate's obligation and the satisfaction of the mortgage, the administrator has attempted, through Wm. H. Moss, the other defendant, to enforce the same," the said Moss, as agent of the administrator, having seized and being about to sell the mortgaged property.

The plaintiff lastly makes the following most serious charge:—that "the mortgage, if not otherwise void, is void in consequence of interlineations made since its execution, without the plaintiff's consent. That the true date of the mortgage is January 1, 1833; whereas it reads January 2, 1833. And that the words "on or before the first of January next" have been interlined; *besides other alterations.*"

The prayer of the plaintiff is for "an injunction to restrain Wm. H. Moss from selling the property; that it be delivered up; that the mortgage be declared void; or if

sustained, that the administrator be compelled to *observe the obligation of the intestate* ;" and for general relief.

It is proper to remark here, that although the plaintiff has not in his bill informed us what interpretation of "*the obligation of the intestate*" he contends for, so as to enable the court, (if it should be just,) to "*compel the administrator to observe it* ;" yet his construction has been orally explained to be, that by an annual payment of the interest on the debt of \$5,565 11 cts., together with as much more money as, (coupled with the interest,) would amount in the whole to an annual payment of "from four to seven hundred dollars," the plaintiff might entitle himself to an indulgence of "eight or ten years."

The defendant, George W. Pressly, in his answer, after admitting that he is administrator of the deceased mortgagee, states, that in the latter part of the summer of 1838 he called on the plaintiff for payment of the mortgage debt, who claimed indulgence under the collateral instrument executed by the intestate; whereupon there arose a difference between them as to the construction of that paper; but that this defendant agreed not to enforce the mortgage for some time, if the plaintiff would, by the first of January, 1839, make him a payment thereon of about \$1000; to which the plaintiff cheerfully acceded; but failed to pay the sum or any part thereof.

That in February, 1839, this defendant again saw the plaintiff, who offering unsatisfactory excuses for his failure to pay as he had promised, insisted on further indulgence, promising to pay something in the course of the spring: "but neither at this time, nor at the previous interview, nor at any period, did the plaintiff ever alledge any thing against the *validity* of the mortgage itself, relying solely on his right to indulgence by virtue of the intestate's obligation, according to his own construction of it; which construction this defendant insists is manifestly erroneous."

"This defendant states here, that he holds a note given by the plaintiff to the intestate for near about the amount credited on the mortgage note, as interest paid, and of the same date as the credit; from which he infers that the plaintiff paid no *money*, on the first of January, 1337, (the date of the credit:) and if so, he has as yet paid nothing according to the terms of the instrument whose benefit he claims.

"The defendant professes ignorance of the payment of \$669 to his intestate for the four negroes, as stated in the bill; nor has he any personal knowledge of the settlement stated to have been made in 1837; but his opinion already stated, respecting that settlement, is strengthened, as he contends, by the admission in the bill that the plaintiff on that occasion gave the intestate two notes of hand.

"With regard to the allegation that the original mortgage note was delivered up, this defendant, having no knowledge of the fact, requires that it be strictly proved; and urges, as proof of its improbability, that in all the interviews between the parties, the only argument of the plaintiff against the immediate enforcement of the mortgage, was the indulgence to which he conceived himself entitled under the collateral instrument. The statement respecting the taking up the original note by the substitution of another of the same tenor, was for the first time disclosed to this defendant by his solicitor, who had got it from the bill, after the same was filed.

"As to the alledged alterations and interlineations in the mortgage, this defendant expresses his decided conviction, arising from the high character of the intestate, through life, and from the repeated recognitions by the plaintiff of the validity of the instrument, by pleading for indulgence under it, and promising to make payment upon it, that if it was altered or interlined after its execution, it must have been done with the knowledge and approbation of the mortgagor.

"Finally, this defendant admits that after the repeated failures of the plaintiff to comply with his promises to pay, he did authorize his co-defendant, who is the sheriff of Edgefield, to proceed to enforce the mortgage, by seizing and selling the mortgaged property."

The cause has been heard on these pleadings, and on testimony taken at the trial; the first question is whether the mortgage was annulled by the substitution of a new note in place of the original one.

From the testimony it appears that the plaintiff gave Dr. Pressly his sealed note, bearing date the 1st of January, 1833, for the payment of 5,565 dollars and 11 cents, one day after the date thereof; being the debt intended to be secured by the mortgage; and that on the 23d of February, 1835, he credited the same with 24 dollars 12½ cents, for money received thereon.

The note was subsequently, and sometime during the life of Doctor Pressly, delivered up to the plaintiff, and another of precisely the same date and tenor was executed by the plaintiff and given to Doctor Pressly; on which latter note Doctor Pressly endorsed a credit, dated the 1st of January, 1837, "for seventeen hundred and twenty-nine dollars and 56 cents, *it being the interest of the within note up to date.*"

There was no witness to this transaction. Peter Quattlebaum states that he was at the plaintiff's house, late in the spring or summer of 1837, when Dr. Pressly was there, and saw them looking over papers, many of which were on the table. Pressly was making or looking over a calculation and Burton was writing: but witness heard nothing said as to the particular nature of the business they were transacting: nor did he see any paper delivered. Another witness, John Brisket, testifies that on the 5th or 6th of June, 1837, he saw Dr. Pressly, and having asked him whether Burton had paid him

pretty well off what he owed him, received for answer that Pressly and Burton had had a settlement, and that he, Pressly, was satisfied. Witness did not understand that Burton had paid off the debt, but that he had paid something on it, with which Dr. Pressly was satisfied.

Being left in the dark by these witnesses, as to what did take place when the one note was substituted for the other, and as to the intention with which the substitution was made, we must draw such inferences from the other circumstances which have transpired as they naturally warrant. If the new note was given *in payment* of the old, the fair inference is that the mortgage must fall with the note on which it was founded. But if, for mere convenience, a new note was executed to take the place of the old one, the object being substitution and not payment, I suppose that all the incidents of the old note were transferred to the new. The debt is not extinguished by the mere change of the evidence of it, where the new evidence is in the same words, and the new instrument does not merge the old by affording a higher or different security.

I conclude from the circumstances here, that there was no intention to pay off the mortgage debt by the change of notes. Upon inspecting the original note, it appears that the credit of Feb. 23, 1835, (for \$24 12½) was endorsed so low on the back of the paper as to leave little room for following credits, unless by resorting to the expedient of endorsing them higher up; the awkwardness of which may have led the parties to change the paper, for one more convenient. It appears from Mr. Quattlebaum's testimony that the parties had *many* papers before them. But the mortgage, the note, and the collateral instrument, were but three. It may be that upon Doctor Pressly's emigration in 1835, carrying with him the note with the credit of February of that year, he left debts unpaid be-

bind him, and that some of these were taken up from time to time by Mr. Burton, and that these were brought in for settlement, and were the subject of calculation, at the time Mr. Quattlebaum speaks of. It is possible that the sums advanced and paid from time to time by Burton, with interest from the time of advancement, (a mode of computation often adopted) amounted, in the aggregate, to the interest computed to be due on the mortgage debt on the 1st of January, 1837; and that to save trouble, a new note was substituted, for the purpose of bearing an endorsement for the whole sum justly allowable to Mr. Burton.

The circumstances stated raised a presumption in my mind that there was no intention to pay off the mortgage debt by the new note. This presumption is strengthened and confirmed by the fact that the mortgage was not taken up, nor was any acknowledgement of satisfaction demanded. Why was the mortgage left outstanding, if the new note was not intended to occupy the place of the old, and the mortgage to continue as security for the debt? But, besides this, Mr. Burton retained the collateral instrument, and according to the testimony of Mr. Belser and Mr Griffin, insisted constantly, up to the filing of his bill, upon this latter instrument. If the new note extinguished the prior debt, and with it the mortgage, the collateral instrument, being by its terms entirely dependant on the mortgage, must also have ceased to operate: and Mr. Burton would, consequently, have been entitled to no indulgence whatever on the new note. When, therefore, Mr. Burton insisted on indulgence according to the terms of the collateral instrument, he in effect acknowledged that the old debt, to which that instrument related, was still subsisting.

It is true that it was the enforcement of the mortgage against which Mr. Burton set up the collateral paper: and he may have meant that if the former was to be enforced, the

latter entitled him to terms. But it is very extraordinary that he confined himself so much as never to have raised the least objection either as to the existence of the mortgage debt, as a mortgage debt, or to the continuing validity of the mortgage. As I understand the witnesses, he treated all three, the debt, the mortgage, and the defeasance, (as he called it,) as operating instruments.

I add but one more observation on this point. Is it probable that Doctor Pressly, who refused to advance his money to an embarrassed man without the high security of a mortgage, intended to give up the mortgage, and take in payment a note in the same words and without security, on the same person whom he had refused to trust unless secured; especially when it appears that in four years he had paid but a very few dollars beyond the interest? Or is it probable that Mr. Burton, a man whose embarrassments had made him so anxiously stipulate for a very long indulgence, should be willing to rescind the stipulations made in his favour, and substitute in lieu of them a new and independent note, over four years due, and on which suit might have been brought forthwith, and the whole debt forced out of him without delay?

The next point relates to the alledged alterations of the mortgage: and the charge is of so serious a nature that I have bestowed on it my utmost attention.

Any *material* alteration of an instrument, *wilfully* made by one party, *without the consent* of the other, and *to his prejudice*, vitiates the instrument. The party in possession of a paper apparently altered in any material point, must show either that it was not in fact altered, or that the alteration was authorised, under the peril of being chargeable with having wilfully made it without authority. If the fact be established against him, either by positive or presumptive proof, it is immaterial whether his motive was innocent or corrupt,

he must in the civil jurisdictions be deprived of the benefit of the instrument dishonored. If he shows that the alteration was made by authority, before the paper was executed, it will constitute a part of the paper:—if after execution, it will not form a constituent of the paper, unless the forms required in the original execution of such a paper were observed after the alteration; but, nevertheless, the body of the instrument will not be invalidated. If he shows that the alteration was not wilful but accidental, it will not incorporate with the instrument, but the body of the latter will not be vitiated by it.

I have said that the burden of accounting for alterations is upon him who is in possession of the instrument: but I suppose that this may be done as well by the proof arising from circumstances as by calling witnesses. I take this to be as good proof as can be expected in this case: because Doctor Pressly, the party charged, is dead: one of the subscribing witnesses is also dead; and the other, who is Mr. Burton's daughter, has not been called.

The first alteration of which the plaintiff complains is in the date of the mortgage. If this is an alteration at all it consists in filling up with a wrong date; not in the change of one date to another. The place was left blank in the instrument, and this date has been inserted. Whether it is material, might form a question; and in that point of view I should think its only materiality would consist in its serving to identify the note which the mortgage was intended to secure. It refers to the note as of one date with the mortgage: whereas the note bears date the 1st of January, one day earlier than the date given to the mortgage. Notwithstanding this discrepancy, both parties acknowledge that the note actually referred to, is not of one date with the mortgage. No injustice, therefore, can follow the misdating of the mortgage deed. Mr. Burton does not deny that the deed was really executed, but he contends that it was executed on

the 1st and not on the 2d of January. Allow that it was executed on the day he states; the case of *Barmoe vs. Jay*, 2 M'C. R. 371, and the cases there cited; *Godard's* case, 2 Rep. 46, and *Jackson ex dem. Hardenbug*, and *Hasbrouk vs. Schoonmaker*, 2 Johns. R. 230) establish that the true date of a deed may be shewn, in opposition to a mistaken date. The only question then is, whether the date was inserted before or after execution. If before, there has been no fraudulent alteration, and the true date is proved by the statements of the bill. If after, there may be difficulty. But is it to be believed that a man having both note and deed in his possession should deliberately insert a wrong date, the only possible effect of which would be to refer to a note not in existence, and destroy his security? The thing is incredible. If the mortgagee had found the date blank after execution, and thought it essential to fill up, the act would have been done with deliberation, and the date would most certainly have been made to correspond with the note in his hands. The difference in date between the deed and note is therefore very satisfactory proof that neither was post-dated; but that the diversity was the effect of a hurried execution. A contemplation of the instrument confirms this view. The body of the mortgage is in pale ink. Following it is an affidavit drawn by Dr. Pressly in ink somewhat deeper. This affidavit, when drawn, had open spaces left for the dating; and was not, in fact, dated or sworn to until long afterwards. The date of the mortgage is filled up with ink corresponding with the body of the affidavit. Then follow the signing and attestation, in ink corresponding to the body of the mortgage. The inference is that the body of the mortgage was drawn by Doctor Pressly with one ink; that then a different standish was used in drawing the affidavit and dating the deed, and that the witnesses and Barton signed with the ink first used. Such things occur every day.

Then come the interlineations in the deed. The first observation is, that according to the bill itself, *some* interlineations were made with the assent of the mortgagor. The receipt executed by Dr. Pressly, the 2d of December, 1834, for the price of the four slaves, Ned, Esther, Leith and Leah, is set forth in the bill, which admits that two of them, Leith and Leah, were included in the mortgage. By the way, this statement is an evidence of the inaccuracy of the bill: for upon examination of both the mortgage and the counterpart, it appears that Ned was included in the former, as well as Leith and Leah, making three instead of two: and it further appears that neither Leith nor Leah is included in the counterpart, although included in the mortgage: thirteen slaves being mortgaged, and only eleven enumerated in the counterpart, which is still farther inaccurate in describing the amount of the debt. What are we to infer where there is such clear evidence of carelessness and inaccuracy?

But what I wish to be particularly remarked here, is, that the name of Leith, who the bill admits was included in the mortgage, is interlined in that instrument; which, as I before observed, is proof that interlineations to *some* extent were authorized.

The interlineations complained of, besides those already disposed of, are, 1st. the words "*on or before the first of January next*"—2d. the words "*interest to be paid annually*;" and 3d. the words added to the affidavit, "*also to the interlining within*."

I shall dispose of the last in the first place: although it is hardly necessary to examine this matter at all, inasmuch as the corruption charged is not of the mortgage, but of the affidavit, which is an independent matter: and conceding that the latter was corrupted, that would by no means affect the validity of the former. The only proof brought to shew that the

words were added to the affidavit after its execution, consists of a copy of the mortgage and affidavit, certified from the office of Secretary of State, where they were registered, the 25th of November, 1834. In this office copy, the words in the affidavit before referred to, are omitted; from which it is inferred that they have been added to the original since the registration. I think this is improbable, for several reasons. First, because the interlineations in the mortgage, which this alleged alteration in the affidavit must have been made to support, were all in the mortgage at the time of registration; as appears from the office copy; from which the reasonable conclusion would seem to be, that the mortgagee, if he did alter the affidavit at all, would have done it at a time when the alteration would have been registered. After the registration I can perceive no motive for the alteration.

Although the words referred to do not appear in the affidavit as exemplified, I do not perceive that it results that they were not there when the paper was registered. The exemplification itself shews that the registration was, in other respects, inaccurate. The recording officer omitted the name of *Barton*, one of the slaves mentioned in the mortgage. If careless in recording the mortgage, are we to suppose him more careful or accurate in registering the affidavit? What credit is to be given to such an official copy?

Again. It must be remembered that the subscribing witness who made the affidavit, is dead, and that the justice before whom it was taken could not say that the words have been added since. But when I look at the dating of the affidavit, I have no doubt whatever that they have not been so added. The dating was originally thus: "Sworn to this — 1834"—leaving the day blank. When the affidavit was made, the date was not inserted in the blank, but was set down to the left hand of it. Why? Obviously because the words here

complained of as an after addition, had been inserted in the blank, after it was left, but before the completion of the affidavit; thus pre-occupying the space and rendering it necessary to set down the date elsewhere.

Let us now turn to the interlineation in the mortgage, of the words "interest to be paid annually." I think it beyond doubt that this interlineation was made before the execution of the instrument. The color of the ink corresponds with the body of the instrument. But the counterpart taken by the mortgagor, contains a stipulation which settles the question. The stipulation is for the payment by him of a certain sum "annually, *with the interest.*" The operation of the two papers is identical. What is very well worthy of remark is, that in his own paper the words "with interest," are an interlineation, in the same hand and in the same ink as the interlineation in the mortgage, of which he complains. But his possession and production of his own paper proves the interlineation therein to be authorized and genuine: which being established, clears that of which it is a counterpart, from all suspicion.

The remaining complaint is of the interlineation of the words "on or before the first day of January next." This charge is, in my opinion, refuted, also, by the counter instrument. It appears by this, which is in Mr. Burton's handwriting, that it was drawn up so as to provide that "the first payment" (by Burton) was "to commence the next January twelve months." But in that state Dr. Pressly would not sign it, as appears from the fact, that before he did subscribe it, he interlined the words "after date," so as to make it read "the first payment to commence the next January, twelve months after date." Now, that he intended to give a different operation to the paper by the addition of these words, is evident. It appears to me that his intention was to define

the January to which the paper was to refer; and to describe it as the January which would accrue twelve months after the date of the paper, instead of that which would accrue twelve months after the next January. If he was content with the time described in the instrument, as drawn up by Mr. Burton, why did he insist on inserting the words he did interline? And if he intended no alteration in the effect of the paper by the interlineation, why did he make it? If Mr. Burton was not brought to the same opinion, why did he submit to have the alteration made? My conclusion is, that the parties intended to give the paper the same reading as if the latter words had been included in a parenthesis, thus: "the first payment to commence the next January, (i. e. twelve months after date.)"

If this was their intention, it may not, to be sure, affect the legal operation of the words actually used in the counter instrument, but it is conclusive evidence of the *fact*, that the words complained of were contemporaneously interlined in the mortgage: which *fact*, let it be borne in mind, is the only question now before us in this point of the case.

But suppose these words to have been subsequently inserted and without authority, do they prejudice Mr. Burton? Strike them out, and the effect of the mortgage and the note would be to require immediate payment of the debt. The insertion of them, therefore, so far from being a cause of complaint, was a positive favor to the mortgagor.

The clear probability, arising from the internal evidence of circumstances, is, that the paper has not been dishonored; and such is my judgment. I will barely add that, if the mortgage was avoided by alterations, as the plaintiff supposes, he was under no necessity to resort to this jurisdiction.

The last question before me is, what is the true interpretation of the instrument held by Mr. Burton? What terms

are thereby secured to him ? I acknowledge that I am here free from difficulty ; for I think the matter is very clear.

By the credit endorsed on the mortgaged note, it appears that the payments, up to the first of January, 1837, amounted to seventeen hundred and twenty-nine dollars and fifty-six cents. This was four years after the date of the note. No other payments have been made since that time. Mr. Burton contends that, by an annual payment, beginning the 1st of January, 1835, of the annual interest on \$5565 11, and also by a payment of so much more money, as, with the interest, would make up annual instalments of from four to seven hundred dollars, he would be entitled to the indulgence specified in the instrument executed by Dr. Pressly.

Let Mr. Burton's interpretation of the paper in question be conceded ; let the payments begin at the time he contends for ; still, from that time, he must, at each payment, extinguish the interest then due, and his annual payments must amount at least to \$400. The plain interest on the first of January, 1838, was \$1947 78 3-4 cents, and on the first of January, 1839, it was \$2337 34½ cents. So that, on his own construction, he was in default, at the time first mentioned, upwards of \$200, and at the time last mentioned, upwards of \$600, for interest alone : and his payments had in January, 1839, fallen short of \$400 a year, by upwards of \$270. These defaults all took place before the administrator of Dr. Pressly proceeded to enforce the sale of the mortgaged property, which was on the 10th of April, 1839. How then, can he contend that he has entitled himself to the indulgence he claims ?

But, I am satisfied his construction of the instrument is erroneous. I am not clearly of the opinion that he is wrong in supposing the words employed in the defeasance, as it has been called, can be legally interpreted so as to require the

first payment to be made in January, 1834; though I incline to that opinion and give it as my judgment. But, I am entirely satisfied, that by the terms of the instrument, and by the manifest intention of the parties, he was bound to make annual payments of at least \$400 over and above the interest on the capital sum of the mortgage debt: and that even in 1837, he was in default from eight to twelve hundred dollars. The terms of the instrument are not equivocal: and if they were, can it be believed that Dr. Pressly intended to receive payments in such measure, that at the end of 10 years, nearly the whole capital of his debt would remain due? The intention, on the contrary, was manifestly to stipulate for such payments towards the principal, annually, as would extinguish the debt in the "eight or ten years," which he agreed to wait.

It is decreed that the injunction granted by the Commissioner be dissolved; that the plaintiff do restore the property to the hands of the defendants as before the said injunction was granted; and that the bill be dismissed with costs.

Grounds of Appeal.

1. That the original note, on which the mortgage from Burton to Pressly was founded, having been delivered up in 1837, the mortgage was thereby discharged.

2. That the interlineations and alterations having been made in the mortgage subsequent to its execution, and without the knowledge or consent of the complainant Burton, it was thereby rendered void and of no effect.

3. That, admitting the mortgage to be valid, when taken in connection with the counterpart executed by Pressly, not more, upon any construction of the instrument, than \$1500, and upon the just construction, not more than \$800, were due; and consequently, the levy made by the sheriff was excessive and void.

4. That Burton should have been allowed a credit upon the mortgage, admitting it to be good, for two negroes, Leith and Leah, the price for which were paid by Burton to Pressly subsequent to the execution of the mortgage.

Curia, per JOHNSTON, Ch. Upon a review of the circuit decree, it appears free from error, except upon a point connected with the fourth ground of appeal, which was not brought to the view of the Chancellor. Certainly the sum paid by the plaintiff for the re-purchase of the two slaves, Leith and Leah, was not paid upon the mortgage debt, and should not be credited thereon. But the slaves themselves should be exempted from the mortgage lien. The mortgage, as all mortgages of personalty do, vested the title in the mortgagee, subject merely to an equity to redeem. When, therefore, Dr. Pressly re-conveyed to the plaintiff, he transferred to him all the title that he had, not only by virtue of his purchase from the sheriff, but under the mortgage itself. The re-conveyance operated as a release of the mortgage *pro tanto*.

It is ordered that the defendant be enjoined from enforcing the mortgage against Leith and Leah. In other respects the circuit decree is affirmed, and it is ordered that the plaintiff pay the costs.

JOHNSON and DUNKIN, Ch., concurred.

Wimbish, Bellinger, and Wardlaw, for the motion.

*The Executors of Caroline Herbemont vs. John S. Thomas
and Wife and others.*

"I direct that the proceeds [&c.] be divided into ten equal parts," six of which were separately bequeathed to six several persons, and then "I devise and bequeath the remaining four tenths to my four nieces" &c., designated by name. *Held* that the nieces were joint tenants, and the share of one who died before the death of the testatrix, went to the survivors.

The A. A. 1748 and 1791, (and it seems also, that of 1734,) modifying the title by joint tenancy, have no effect, except in case of the interest actually vested.

Mrs. Caroline Herbemont disposed by will, amongst other things, as follows, viz: "and I hereby devise and bequeath the proceeds of the said sale, together with the bond of John Howell, for twenty-nine thousand dollars, given by him for the plantation and negroes on Broad River, or rather the securities taken in substitution for the said bond, and now in the hands of my Trustees, in the following manner, to wit:—I direct that the proceeds of the sale of the house and lot, and the proceeds of John Howell's bond or its substitutes, be divided into ten equal parts, whereof I devise and bequeath one tenth part to my sister, Harriett Sollee—I devise and bequeath one other tenth part to my sister, Charlotte Marshall—I devise and bequeath one other tenth part to my niece, Laura E. Breevoort—I devise and bequeath one other tenth part to my niece, Charlotte Eleanor Percival—I devise and bequeath one other tenth part to my niece, Caroline Gracia Marshall—I devise and bequeath one other tenth part to my niece, Caroline Neyle Sollee; and I *devise and bequeath the remaining four tenths, to my four nieces in Georgia, daughters of my brother Sampson Neyle, to wit; Mary Bryan Neyle, Eliza Hesther Neyle, Charlotte Neyle, and Emily Neyle.* To my grand niece, Charlotte Percival, the daughter of my niece, Charlotte Eleanor Percival, I give

and bequeath the negroes, Henry, Mortimer, Sophia and Ariadne, with the future increase of the females forever."——
"In case either of my nieces should die unmarried, before the period when my will is to take effect, (for I repeat that my dear husband is to have the full use of all my property during his life) I devise and bequeath the share of the legatee so dying, to my surviving sisters and nieces."——"I devise and bequeath the residue of my estate to my grand niece, Charlotte Percival."

Mary Bryan Neyle married and died, leaving a husband and children, before the death of Mrs. Herbemont.

Under these circumstances the three surviving sisters (with their husbands, the defendants in this case,) claimed the entire four tenths as a joint tenancy; but the court directed the share of Mary Bryan to be given to Charlotte Percival, the residuary legatee.

From this decree the defendants appealed, on the ground that the legacy was to the four daughters of Sampson Neyle as joint tenants, and that, on the death of their sister, Mary Bryan, the whole survived to them.

Curia, per JOHNSTON, Ch. No doubt has been intimated that the words of the bequest to the Misses Neyle, without reference to the other words of the Will, are such as, at Common Law, constitute the legatees joint tenants of the thing given.

One of the acknowledged Common Law incidents of a joint tenancy is that, upon the death of any of the tenants, before or after the vesting of the right, the survivors take the whole. (See the case of *Owen vs. Owen*, 1 Atk. 494, and the authorities referred to in that case and in the notes.)

In this case, Mary Bryan Neyle died before the testatrix, and of course before the will could operate to vest in her the interests given to her by that instrument; and the survivors

must take, unless there is something in the Acts of the Legislature to divert the right from them, or unless there are other words in the will qualifying the words of this bequest, and shewing that they do not, in fact, create a joint tenancy.

The Acts of 1734, (P. L. 139,) 1748, (P. L. 18,) and 1791, (1 Faust, 27,) all recognize the title by joint tenancy as one well known to our laws, and have not undertaken to abolish it. They simply regulate and modify its qualities in certain cases; in all of which they contemplate, as a pre-requisite to their own operation, that the interest upon which they are to operate shall have actually vested. If there is any exception, it is in the Act of 1734, which authorizes a joint tenant to transmit his interests by will: but that Act cannot reach this case, because, even if Mary Bryan could have disposed of her interests by will, she made none.

Then, are there any qualifying words in the context of Mrs. Herbemont's will, shewing that the Misses Neyle do not take their legacies as joint tenants? If it is a case of joint tenancy, the survivors take; if it is a tenancy in common, the share of Mary Bryan was by her death freed from it, and became intestate as to the clause containing the bequest, and lapsed into the residuary clause.

The leaning, in England, as between testacy and intestacy, is in favor of the former,—perhaps to a greater extent than would be allowed here: but, as between joint tenancies and tenancies in common, although it was anciently otherwise, (1 Vesey Sen'r. 166) the leaning is in favor of the latter, notwithstanding its quality of lapsing. Thus the Lord Chancellor, in *Joliffe vs. East*, (3 Br. C. R. 27,) said "I believe it is very well understood that the court decrees a tenancy in common as much as it can," and intimated, as done by the Master of the Rolls in *Russell vs. Long* (4 Ves. 554,) that the rule of survivorship will be admitted only where there are no

words that will point to a tenancy in common. The same doctrine, with the reasons of it, is explicitly stated by the Lord Chancellor in *Stones vs. Heartly*, (1 Ves. Sen. 166,) and is said in *Owen vs. Owen*, (1 Atk. 495,) to be particularly applicable to wills.

Under the inclination to prefer constructions favorable to tenancies in common, the courts have habitually laid hold of the slightest words evincive of an intention to create a severance. Thus, in *Owen vs. Owen* (1 Atk. 494) before referred to, where the bequest was to two jointly, with a direction to *divide equally between them*, there, the latter words were held to constitute a tenancy in common. The same effect was allowed in *Lashbrook vs. Cock*, (2 Meriv. 70,) where the testator gave property to his two daughters, *between them*; and, in *Ackerman vs. Burrows* (3 Ves. & Beames, 54,) where the will was in an epistolary form, addressed to the testator's mother and sisters, and contained bequests "to be divided *amongst you*." So, in *Campbell vs. Campbell*, (4 Br. C. R. 15,) where some of the legacies were given *to*, and others *to and amongst* the legatees, a distinction was drawn between them, and the former were held to be joint tenants, while the latter, by force of the word *amongst*, a very slight word for that purpose, were adjudged to be tenants in common; and, in *Perkins vs. Baynton*, (1 Br. C. R. 118,) where the will gave "to Stukely and William £1500, *jointly and between them*," the word *between* was held to create a severance. (See the cases collected in *Ward on Legacies*, ch. 453, 18 Law Libr. 226.)

It is supposed that there are words in the context of this will which may be laid hold of to construe this legacy a tenancy in common; and the direction that the avails of the house and of Howell's bond "be divided into ten equal parts," (four of which are, in the clause now under consideration, bequeathed to the Misses Neyle,) has been relied on for this purpose.

It does not appear, from the cases, that the mere fact, that the subject of the bequest consists of several parts, militates against the idea of its being held by a joint interest, unless it has been reduced into parts with a view to several enjoyment. Thus, five horses, or ten slaves, or a thousand sheep, may be the subject of a gift in joint tenancy. But, if a thing in a state of entirety is directed to be sub-divided, and is then transferred by words of joint gift, the interest passing by the words may be joint, or several, according to the intention with which the sub-division was ordered to be made. Thus, if a testator, having four children, should direct that his estate should be divided into four parts, and then give the whole estate to four children, without words of severance, this must be considered as a gift of one fourth to each; for, unless such was the testator's intention, the direction to divide the subject matter of bequest into parts was a senseless act. But if the same testator should direct that one fourth should be separated from his estate and given to one of his children, and that the *residue* should be given to the other three children, it is not easy to perceive on what principle it could be assumed that his intention was that the three should hold several interests, and that the property given them should be severed into three parts, when he gave no such direction.

In the case before us, every thing depends on the intention with which the fund was directed to be divided into ten parts. If that intention extended into the clause by which four of the tenths were bequeathed to the Misses Neyle, that circumstance, it appears to me, would be decisive of the question we are considering. But it appears from a contemplation of the will, that the motive of sub-division was to render the composition of the instrument more convenient. As there was an intention to give a tenth of the fund to several legatees, (six in number,) the direction to divide the whole into ten

parts was with a view to facilitate the expression by which the legacies were to be given to these six. After the six legacies were disposed of, there remained a surplus consisting of four tenths, which was given as a surplus, ("remaining,") to the four Misses Neyle.

I have considered the words, directing the division into parts, solely with reference to the intention with which they were apparently employed. This appears to be the proper way of estimating their influence as qualifying words, and the same way in which the qualifying words were considered in the cases to which I have referred. The court, in all the cases, professed to be in search of the intention to be collected from the words employed. They acknowledged, indeed, a disposition to be easily persuaded that the intention was according to that kind of estate most favored by them; and, judging from the slightness of the words and expressions which they allowed in some cases to prevail, their disposition to receive the desired impression was most anxious. But, in no case has it been intimated that words are to be arbitrarily wrested to a purpose not agreeable to the intention with which they were used.

It is ordered that the circuit decree, upon the point appealed from, be set aside, and it is adjudged that the four tenths decreed to Mary Bryan Neyle, Eliza Hester Neyle, Charlotte Neyle and Emily Neyle, vested entirely in the said Eliza Hester, Charlotte and Emily, as joint tenants.

JOHNSON and DUNKIN, Ch., concurred.

Petigru, for the motion. *Gregg*, contra.

J. McD. Garlick, Adm'r. of Reuben Patterson, dec'd. vs. Joseph Patterson and others.

There being a balance remaining in the Sheriff's hands, after sale of a part of an intestate's estate in satisfaction of executions, the administrator was not entitled to the surplus, either in law or in equity, as assets for payment of debts; though the creditors themselves might have claimed it at law.

Heard by JOHNSON, Ch.

The defendants were the heirs at law of Reuben Patterson, who died intestate, possessed of real and personal estate, but insolvent to a large amount. At the time of his death there were judgments and executions against him; under which, after exhausting the personalty, the sheriff proceeded to levy on and sell part of the real estate. Of the proceeds of the latter, there remained in the sheriff's hands a surplus of about ninety-seven dollars.

The bill, in this case, was filed by the administrator, to make the lands unsold equitable assets for the payment of the intestate's debts, and to compel the sheriff to pay over to him the balance above mentioned, to be assets for the same purpose.

The court, as to that part relating to the balance in the sheriff's hands, dismissed the bill, on the ground that the administrator had his action at law against the sheriff.

The complainant appealed and moved to reverse this part of the decree, on the ground that he had no remedy but in Equity.

Curia, per JOHNSON, Ch. At the hearing, I was inclined to think that the fund in the sheriff's hands, although the proceeds of the sales of real estate, had become assets in the hands of the administrator for the payment of debts, and that, therefore, he might maintain an action at law to recover

it; but, if he was not entitled to it and had no authority to dispose of it in the regular course of administration, still, the bill could not have been maintained. I therefore dismissed so much of it as relates to this subject.

On reviewing the case upon the argument here, I am satisfied that there was no foundation for the opinion that the complainant, as administrator, was entitled to the fund. On the death of the ancestor, the legal estate in the realty vests immediately in the heir or distributees,—subject, it is true, to the payment of debts, but if any thing remains, they, and not the administrator, are entitled to pursue the fund. They are not parties to the bill, and there is no other allegation of the existence of outstanding debts than the voluntary declarations of the administrator. If there are unsatisfied creditors, they are undoubtedly entitled to the fund; but it is their right, and not the administrator's, to complain.

The motion to reverse the decree of the Circuit Court is therefore dismissed.

DUNKIN, Ch. concurred.

Clinton, for the motion. *Withers*, contra.

AT CHARLESTON, FEBRUARY, 1840.

CHHANCELLORS PRESENT.

HON. DAVID JOHNSON,
HON. JOB JOHNSTON,
HON. WM. HARPER,
HON. B. F. DUNKIN.

Robert Smith, Executor, and Helena Patterson, vs. J. L. Patterson, Administrator of Samel Patterson, deceased.

A bond, in consideration of marriage, conditioned for the payment of money to the obligor's intended wife, after his death, is a marriage settlement within the purview of A. A. 1785, and void for not being duly recorded.

Heard by DUNKIN, Ch., whose decree includes a sufficient history of the case.

"The Act of 1785 provides that every marriage contract, deed or settlement, entered into for securing any part of the estate, real or personal, in this State, of any person or persons whomsoever, shall, within three months after the execution thereof, be duly proved and recorded in the office of the Secretary of State, and in default thereof, such marriage deed, contract or settlement, shall be deemed, and is thereby declared, fraudulent, and all and every part of the estate thereby intended to be secured to such person or persons, shall be

subject and liable to the payment and satisfaction of the debts due and owing by such person or persons, in as full and ample a manner, to all intents and purposes whatsoever, as if no such deed, contract or settlement had been ever made or executed.

"On 2d August, 1836, the defendant's intestate became bound to Wm. Mason Smith, in trust for the complainant, then Helena Bache, who was described or designated as his intended wife, in the penal sum of \$8,000, conditioned for the payment of \$4,000, within three months after his decease. The bond was enclosed in a letter directed to Mr. Smith, and which declared the trusts on which the money was to be held. It did not appear that the bond or letter had ever been out of the possession of the obligor prior to his death in January, 1839. The estate of the intestate is insufficient to pay his debts, and the point submitted, is whether this bond is within the operation of the Act of 1785.

"In *Banks vs. Bruen and Wife*, (2 Hill C. R. 565,) it is said by the court, "There is some diversity of opinion as to what constitutes a marriage settlement, within the meaning of the Act. *Prima facie*, the terms obviously import a settlement founded on the consideration of marriage." It is part of the allegation in the bill, that this bond was given in consideration of the intended marriage between the parties. It is therefore a marriage contract.

"But it was said, the Act was only intended for such settlements or contracts as were made to secure tangible property, of which the possessor is the ostensible owner, and not for contracts to secure the payment of money. The terms of the Act are general. I think it cannot be doubted that this was a contract on the part of Mr. Patterson, to secure to his intended wife \$4,000, to be paid out of his estate, within three months after his decease. It was a contract made in

contemplation and in consideration of marriage. The sum of \$4,000, was the part of his estate intended to be secured, and by the provisions of the Act, the contract, as to creditors, is fraudulent in law, and the sum intended to be secured is to be applied to the payment of his debts, as if that contract never existed. In the *Bank vs. Mitchell*, July, 1839, the Court of Errors held that an unrecorded agreement to make a settlement, was so absolute a nullity, when the rights of the creditors were involved, that it would not sustain a post nuptial settlement, made in pursuance of the articles, and duly recorded.

“The preamble to the Act, and, perhaps, the language of the enacting clause, affords color to the argument of the complainant. The great mischief was probably that to which the preamble points. It was injurious to the right of creditors, that real or personal estate of which their debtor was in the enjoyment, and in the faith of which he may have been trusted, should be protected by deeds of which they had no notice. But the evil would scarcely be less if, in contemplation of marriage, a man could give a bond to half the value of his estate for the benefit of his family, which could not be demanded during his life time; but would have a general preference over his other debts after his decease. It is hardly an answer, that his bond to a stranger for valuable consideration, is not recorded, and is yet entitled to priority of payment in the administration of his assets. It is not the interest of a bona fide creditor to allow his debt to remain unpaid; but it is the interest of the debtor's family, that he and they should not be interrupted in the enjoyment of the property during his lifetime. The great object of the marriage settlement Act, is to prevent injury to creditors, from latent claims which the parties are not interested to enforce. It ap-

pears to the court that this contract is within the terms of the Act, and within the mischief intended to be prevented.

"It is ordered and decreed that the bill be dismissed."

The complainants appealed, on the ground that the bond to William Mason Smith was not a settlement, and therefore not within the provisions of the Act of 1785.

Curia, per DUNKIN, Ch. At the hearing of this cause, it was understood to be the object of the parties, to test the validity of the bond, as in a controversy with creditors; and for this purpose a statement of the debts and assets was submitted, to shew the insolvency of the intestate's estate. It is thought proper to say thus much, as it might otherwise be well doubted whether the legal representative of the party would be permitted to make the question, which has alone been submitted for the judgment of the court. If the bond be regarded as voluntary, or if, taken in connection with the letter to the Justice, in which it was enveloped, the papers be regarded as testamentary, it is scarcely necessary to say that it cannot stand against the claims of the creditors. If founded on a valuable consideration, it is on the consideration of marriage. The court agree with the Chancellor that this is a marriage contract. If the terms of the Act of Assembly were less clear and imperative, there might be weight in the argument, that a contract of this character was not intended to be embraced in its provisions. But it seems to the court, that the language is too comprehensive to leave room for conjecture as to the probable intention, or permit the application of rules which are provided to aid the judgment in cases of doubtful construction. The appeal is dismissed.

HARPER, JOHNSON and JOHNSTON, Ch., concurred.

Petigru & Lesesne, for the motion. *Mazyck*, contra.

Robert Bentham vs. Juliette Ann Smith and others.

Conveyance in trust to the use of W. S. for life; after to such person as he shall appoint by *will*, or in default thereof, to his children. W. S. mortgaged the estate, (which was sold under a fore-closure, in his lifetime, and bought in by the creditor,) and died insolvent and intestate. The court would not restrain the children from enforcing their claim as remainder-men.

The court will not lend its aid to bar contingent remainders, and it makes no difference that the remainder-men are the children of the tenant for life.

A power to appoint by *will* is not executed by a mortgage to creditors with fore-closure and sale.

Josiah Smith conveyed a certain messuage in trust for William Stevens Smith during his natural life, and after his death, to such person, &c., as he, by any writing in nature of his last will and testament, signed and sealed by him, and executed in presence of three credible witnesses, might limit and appoint, and, in default of such appointment, to such child or children as he might leave, equally to be divided among them. William Stevens Smith, being indebted to Robert Bentham, the complainant, executed a mortgage of the premises to secure the debt. Under a fore-closure, at law, of this mortgage, the premises were sold and conveyed by the Sheriff, in fee simple, to the complainant. Smith afterwards died insolvent and intestate, leaving Juliette Ann and other children, the present defendants.

After Wm. Smith's death, Juliette Ann, having been in possession as complainant's tenant, claimed to hold, in right of herself and the other children, under the deed of Josiah Smith.

The complainant insisted that the remainders were contingent and might have been barred by William Smith, who had a right, under the deed, to appoint to whom he pleased, and was bound to appoint for the benefit of his creditors; and prayed to have the benefit of his deeds as an equitable

execution of the power of appointment; suggesting, also, that the mortgage, fore-closure and judicial sale, were equivalent to a feoffment and livery of seisin; but that, at all events, the defendants ought not to be allowed, in Equity, to set up the want of these to defeat creditors.

His Honor, Chancellor DUNKIN, decreed as follows:

This case is presented under two aspects. The interest of the defendants under the deed of Josiah Smith, was, it is said, during the lifetime of their father, a contingent remainder, which he might have barred by feoffment and livery of seisin.

It is then urged, that if the mortgage, foreclosure and judicial sale are not equivalent to a deed of feoffment, yet that the defendants ought not, as against creditors, to be allowed to avail themselves of this defect, but should be enjoined from setting up the deed of Josiah Smith, and be decreed to join in confirming the title of the complainant.

The application to this court supposes and admits, that the complainant has no remedy at law. Will this court aid a purchaser from the tenant for life, who has made an ineffectual attempt to destroy the contingent remainders, as against the remaindermen? In *Dehon vs. Redfern*, (Dudley Eq. 123,) this court refused to compel a purchaser from the tenant for life, to receive a title, admitted to be perfect, but which was intended to defeat the remainders. In the case under consideration, the defendants take nothing by or through their father, the tenant for life, but are purchasers under the deed of the grantor. It is not perceived that any difference exists between their condition and that of strangers who were remaindermen, and whose title this court would lend no aid in disturbing. 1 Fonb. B. 1, ch. 187, n. (w.)

But on the death of the tenant for life, the estate is limited to the use of such persons, and for such purposes as the said

Wm. S. Smith, by any writing, in nature of his last will, executed in the presence of three credible witnesses, might appoint. Having the power to appoint to whom he pleased, it is insisted by the complainants, that he was bound to appoint the same for the payment of his debts; and that the deeds are an equitable execution of the power of appointment, which this court will perfect in favor of creditors. Several cases were cited, in which a party having a general power of appointment, was treated, in this court, as the owner of the estate. And in *Townsend vs. Medham* (2 Ves. 1,) where the power was executed in favor of a child, it was considered as a voluntary gift, and set aside in favor of creditors. "Where," says Lord Hardwicke, in that case, "there is a general power of appointment of a sum of money, which it is absolutely in the pleasure of the party to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself, or his executors, if he pleases. If he execute it voluntarily, without consideration, for the benefit of a third person, this shall be considered as part of his assets, and his creditors have the benefit of it." And so in *Pack vs. Bathurst*, (3 Atk. 290.) But in all the cases the power of appointment is general by deed or will.

There was certainly something in what was said for the complainant, that he was entitled to every security, which Smith might have given him. But this assumes that the premises belonged to W. S. Smith. Now, originally, the fee was in Josiah Smith. By his grant, W. S. Smith had an estate for life, with a power of disposing of the inheritance. As is said in *Tomlinson vs. Dighton*, (1 P. Wms. 271,) "the estate limited, being express and certain, the power is a distinct gift, and comes in by way of addition." In *Reid vs. Shergold*, (10 Ves. 379,) Lord Eldon holds the rule to be well settled, that where there is an express limitation for life, with power to dispose by will, the

interest is equivalent only to an estate for life ; and the power is to be executed *prima facie*, at least, by will." He adds, "he studiously confines her power of giving the premises to a power of giving by will, in its nature revocable in every period of life ; the power was given in that way, to protect her against her own act ; she had nothing therefore in interest, but for her life. In point of authority, she might, by her will, have made a disposition, to take effect after her death." The Lord Chancellor concludes with some remarks which may not be inapplicable to the argument in this case. "It is then said, if the sale is not good as a sale, it shall be taken to be either something in the nature of a contract, with reference to which a purchaser for valuable consideration, is to be aided ; or an attempt, an act done, in or towards the execution, in respect of which this court will aid him. I do not stay to determine, whether it appears that she meant to execute the power," &c. "The testator did not mean that she should so execute her power. He intended that she should give by will, or not at all ; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power, the testator meant to remain capable of execution to the moment of her death, can be considered, in equity, an attempt in or towards the execution of the power." On the authority of this, and some other cases, Mr. Justice Story states the rule, "that if the power ought to be executed by deed, but it is executed by a will, the defective execution will be aided. But if the power ought to be executed by a will, and the donee should execute a conveyance of the estate by a deed, it will be invalid." 1 Story Eq. 185.

Upon the whole, I am of opinion, that it is a case in which the court cannot interfere, for the relief of the complainant ; and the bill must be dismissed.

The complainant appealed, on the ground that the mortgage by a party who was in possession and able to make a good title, is a contract for assuring the premises to the mortgagee, which the heirs of the mortgagor should be compelled to perform.

The court unanimously concurred with the Chancellor, for the reasons stated in the decree.

William H. Wilson, Executor of Stephen Mazyck, vs. William A. Hayne and Wife and others.

Bequest to a wife, for life and widowhood, with remainders over, and in case of a second marriage, to "devolve upon the persons mentioned in the said will as if she my said wife had departed this life; my will being that she shall have no interest whatever in my estate after her second marriage." Held to be a sufficient implication of an intent to exclude the wife from her dower.

By proving the will and receiving the profits for five years, it seems the widow must be held to have determined her election and relinquished her dower.

Stephen Mazyck, by his last will and testament, bearing date the 3rd of May, 1832, amongst other things, devised and bequeathed as follows:—

"Imprimis. I give, devise, and bequeath, unto my beloved wife, Susan Smith Mazyck, all the property of whatsoever nature or kind, which my said wife possessed, or was entitled to, at the time of our marriage, or which has come to her since, in her own right; and particularly a slave named Jane, with her issue and increase: to have and to hold the same

to her, her heirs, executors, administrators, and assigns, forever.

Secondly. I give and bequeath unto my beloved and adopted daughter, Susan Mazyck, the child of my brother, Robert W. Mazyck, on her marriage, or attaining the age of twenty-one years, twenty negro slaves, to be selected from my whole gang of negroes, by my executors, or such as may qualify, at the time of my death; of which number, six shall be workers; to have and to hold the same to her, her executors, administrators, and assigns, forever.

Thirdly. I give, devise and bequeath unto my beloved wife, Susan Smith Mazyck, all the rest, residue, and remainder, of my estate, both real and personal, of whatsoever nature or kind: to have and to hold the same, for and during the term of her natural life only. And I do hereby also give to my said wife, the use, labor and profit of the aforesaid twenty negro slaves, (directed to be selected by my executors, for my adopted daughter, Susan Mazyck, in the second clause, preceding this,) from the time of my death, until my said adopted daughter shall be married, or arrive at twenty-one years of age: and I do hereby declare, that my said wife is not to be accountable or responsible for the use and labor of the said twenty negro slaves, during the aforesaid term, to any person whatsoever, or in any manner whatsoever."

By the fourth, and subsequent clauses of his will, the testator disposed of his estate, after the death of his wife, to various persons, with divers limitations over; but none of them contain any provision relevant to the subject of the present appeal. A codicil, however, bearing date the same day with the will, to wit, the 3rd of May, 1832, contains the following clause:—

"And whereas, also, in the third clause of my said last will and testament, I have given the whole of my estate, real and

personal, with the exception of twenty negro slaves, to my wife, Susan Smith Mazyck, for and during the term of her natural life; besides the use of twenty negro slaves, directed to be selected for my adopted daughter, until my said adopted daughter should be married, or arrive at the age of twenty-one years: and whereas, it is my will and desire, that the estate of my said wife shall cease, not only at her natural life, but also on her inter-marriage with another husband; I do, therefore, hereby will and direct, that the devise and bequest, so made of my estate, real and personal, in the third clause of my said will, shall be so far altered, that my said wife, Susan Smith Mazyck, shall enjoy the same only during her widowhood, and that at the termination thereof, the said estate, real and personal, shall wholly devolve upon the persons mentioned in the said will, as if she, my said wife, had departed this life: my will being, that she shall have no interest, whatever, in my estate, after her second marriage."

And by the said codicil, the testator appointed his said wife, executrix, and his brother, Robert W. Mazyck, and William H. Wilson, the present complainant, executors of his said will and codicil.

The testator departed this life some time in November, 1832, leaving the aforesaid will and codicil in full force; and they were shortly afterwards duly proved by R. W. Mazyck, who qualified as executor: and subsequently the widow also qualified as executrix, and the present complainant as executor.

The widow Susan Smith Mazyck, continued to reside on the plantation of the testator, and remained in the enjoyment of the estate devised and bequeathed to her, until the year 1837, when she inter-married with the present defendant, William A. Hayne.

The bill, in this case, was filed in January, 1838, to have the trusts of the said will and codicil declared, and to obtain

an order for the sale of the testator's estate, real and personal. The said William A. Hayne, and his said wife, were made parties defendants thereto; and the bill prayed, that the said Susan Smith Hayne might either be declared not entitled to dower of the real estate of the testator, or might be required to elect to take under, or against, the will and codicil, and account for the income of the estate received by her, if she should elect to take dower. The defendants, William A. Hayne and wife, submitted by their answer, that she was not bound to elect, and that she was not barred of her right of dower, by her acceptance of the estate during widowhood; and they prayed that her dower might be assigned to her.

The cause came on for hearing, at Charleston, in January, 1839, before Chancellor HARPER, who pronounced a decree, of which the following extract, alone, relates to the subject of the present appeal.

"With respect to the claim for dower, after the determination of the widow's life estate by her second marriage, I think it cannot be supported. The rule is, as stated in *Gordon vs. Stevens*, (2 Hill's Ch. 49,) that as the right of dower is a clear legal right, an intent to exclude that right "must be manifested by express words, or by clear and manifest implication." I think the intent is so manifested in the present case. By the will, the whole estate is given to the wife for life. If this had been all, it is admitted there could have been no claim for dower. By the codicil, the testator directs that his wife "shall enjoy the same only during her widowhood, and that at the termination thereof, the said estate, real and personal, shall wholly devolve upon the persons mentioned in the said will, as if she, my said wife, had departed this life: my will being, that she shall have no interest, whatever, in my estate after her second marriage." The estate in dower would have terminated at her death; and if upon her

second marriage, it is to devolve *wholly* upon others, as if *she had departed this life*, I do not know what stronger terms could have been used to exclude her from dower after that event.

"It is hardly necessary to say any thing, I suppose, on the subject of election. The widow received the profits of the entire estate for five years, which must have been more than equivalent to a life estate in one third, after the termination of her widowhood. But I should think, according to the cases of *Ardesoife vs. Bennet*, (2 Dick. 463,) and *Butricke vs. Brodhurst*, (3 Bro. C. C. 88,) that she must be held to have determined her election, by proving the will, and receiving the profits of the estate for so long a time."

His Honor, therefore, refused to order the dower of the defendant, Susan S. Hayne, to be assigned to her: whereupon William A. Hayne, and wife, appealed from the said decree, and moved that the same might be reversed or modified, in that particular, on the following grounds:—

1. That the widow's right of dower is not barred by her acceptance of a provision for her contained in the will of her husband, unless it appear, either by *express declaration*, or by *necessary implication* from the provisions of the will, that such provision for the widow was intended to be in lieu and bar of dower: and it is respectfully submitted, that in the will of the testator, in this case, there is neither any such express declaration, nor does any such implication arise, either from the devise of the whole estate to her during her widowhood, or the devise over, on the determination of that estate; nor from any other provision of the will.

2. That even if the provision for the widow, in this case, and her right of dower, are incompatible, she has the right to elect between them; and that her right of election has not

been determined, and it should have been so ordered and decreed.

The court concurred unanimously in the opinion of the Circuit Court: *Present*, JOHNSON, HARPER, JOHNSTON, and DUNKIN, Ch.

Bailey, for the motion; (2 Tred. Const. Rep. 746; 1 M'C. R. 386.)

Mazyck, contra; (2 Johns. Ch. R. 448; 2 Sch. & Lefr. 444; 4 Co. Rep. 3, a, *Vernon's case*; 3 Russ. 192.)

*Robert H. Garden vs. Theodore Hunt and Randall Hunt,
Executors of Thomas Hunt.*

Absent and non resident executors, of one deceased in this State, cannot be made amenable to suits in this Court, when neither they nor their testator have property in the State.

Before his Honor, Chancellor Dunkin, at Charleston, October, 1839.

The purpose of the bill, in this case, was to compel the executors to account for the proceeds of sale of a plantation, sold by Thomas Hunt, deceased, as Commissioner in Equity for Sumter District.

The complainant's solicitors, upon affidavit that the defendants were absent from the State and resident in Louisiana, moved for an order in the usual form, requiring the

defendants to appear, within three months after the publication thereof, and plead, answer, or demur to the bill, in default whereof, it should be taken *pro confesso*.

The Chancellor refused to make this order, and the complainant appealed, on the following grounds:

1st. That the defendants, by proving the will of their testator, and taking out Letters Testamentary in this State, assumed a trust having reference to property and rights within the jurisdiction of this State, and for which they were responsible to the same jurisdiction. And one of the necessary incidents of such trust is to answer in this jurisdiction to all demands against their testator.

2d. That the office of executor or administrator is a delegation of public authority, and as to all matters relating to such office, the person filling it, whether present or absent, is liable to the jurisdiction of this State.

3d. That the complainant's demand having arisen out of an official transaction of the defendants's testator, as Commissioner in Equity, the official relation continues as to the said demand, and constitutes a sufficient ground for the jurisdiction of the court existing in the subject matter of the suit itself.

Curia, per DUNKIN, Ch. Both the defendants were resident beyond the limits of this State. Neither of them had property in the State, nor is it alleged that there were any assets of the testator in the State. In *Winstanly vs. Savage*, (2 McC. C. R. 437,) it is said by the Chancellor "it is very certain that non-residents cannot be made amenable to suits in this court, unless they have property in the State." It is also there said that the Act of 1784, creating the Court of Chancery, and prescribing its course of proceedings, was not intended to introduce any new rule in this respect, but "only

to regulate the proceedings in cases where non-residents could be made amenable to the jurisdiction of the country, by holding property within it, which does undoubtedly give jurisdiction both at Law and in Equity.

It appears to the Court that this is a correct interpretation of the law, and that the order of the Circuit Court, made in conformity with it, must be affirmed.

HARPER, JOHNSON and JOHNSTON, Ch., concurred.

Peronneau, Mazyck & Finley, for the motion.

Ex parte George Warren and Harriet Ann, his Wife, formerly Risher.

Under the A. A. 1789, providing for posthumous children, the posthumous child's share is held subject to the provisions and limitations of the will.

This does not conflict with the decision in *Ex parte Wamer et ux.* (Dudley C. R. 154,) for the event on which that case turned, was one not provided for or contemplated by the will.

How, *after the expiration* of the child's estate, the *remainder* will be affected by the limitations of the will, has not been determined.

Heard before his Honor Ch. DUNKIN, at Walterborough, January, 1839, who made the following order:

"The object of this petition is to obtain provision for Adeline Elizabeth Risher, the posthumous child of Adeline F. Risher, dec'd. The Act of 1789 explicitly declares, that the portion of the posthumous child shall be made up from

the shares of the other child or children, for whom provision is made by the will of the testator. By the will of Risher, a life interest is given to his widow in a portion of his estate. At present, a Writ of Partition may issue to divide the negroes, specifically bequeathed to his wife and his son, Joseph Koger Risher, in equal moieties, apportioning one moiety to each, and then to sub-divide the moiety set off to the son, into two equal parts, allotting one part to the said posthumous child, Adeline Elizabeth Risher; the portion set off to the several parties, to be held by them, subject to the provisions and limitations of the will of Francis F. Risher, deceased. It is ordered, that on giving security in double the amount of the estate real and personal, of the minors, Joseph Koger Risher and Adeline E. Risher, the said George Warren be appointed their guardian."

An appeal was taken, on the ground that the portion of Adeline E. Risher was to be held absolutely, and not subject to the provisions and limitations of the will.

Curia, per DUNKIN, Ch. It is supposed that the decree below is at variance with the judgment of the Court of Errors in *Ex parte Wamer and wife*, (Dudley's Eq. Rep. 154.) Perhaps it is proper to remark that the case of *Wamer and wife*, was carried to the Court of Errors in consequence of a division of opinion in the Appeal Court of Chancery. It was ultimately decided by a bare majority of the Court of Errors, and the judgment was expressly restricted to the conclusion to which the Circuit Chancellor had arrived, to wit, that the petition should be dismissed.

By the will of Pendarvis, certain portions of his estate were bequeathed to his children, Amanda and Joshua; and it was provided "that in the event of either of my children dying, leaving no issue, in that case it is my will and devise,

that his or her share shall go to the surviving one." Wm. L. Pendarvis was a posthumous child, for whom no provision was made by the will. In 1834, proceedings were instituted in the Court of Chancery for the purpose of having a contribution under the Act of 1789, and a division was accordingly made. Wm. L. Pendarvis having died the following year, about two years of age, a petition was filed by Amanda and Joshua, claiming the share which had been allotted to Wm. L. on the ground "that they were entitled by law to be re-instated in the same situation, as if the posthumous child had not been born." The petition was dismissed by the Chancellor, and his conclusion was affirmed by the Court of Errors. It seems to be assumed, by the appellant, as the decision of the court in *Ex parte Wamer and wife*, that under the Act of 1789, the posthumous child would take an absolute estate in the portion made up for him, although the estate of his brothers and sisters may, under the will, be only for life, or years, or qualified and restricted in any other manner. Such does not seem to this court to be the correct interpretation of the Act, or of the decision. Some expressions of the Chancellor may leave the impression that such was his opinion, although he distinctly states that "he supposes the posthumous child takes only a share of the particular interest or estate, whatever that may be, which is given to the child provided for by the will. For instance, a father gives to his son A for life, and at his death to a stranger. The posthumous child takes only a share of A's life estate, and holds for the life of A. Then upon the death of the posthumous child, the estate does not upon that event go over to the stranger, by the limitation of the will. It is transmitted to his legal representatives and next of kin, to be held until the termination of the estate *pur autre vie*." It is afterwards said "if Joshua should hereafter die leaving no issue, then the ques-

tion may be made, whether the entire estate given to him by his father's will, including the portion received by William, and which is now to be distributed between himself and his mother, shall go over to Amanda—that is to say, *whether William took, subject to the contingency.*”

Neither in that case nor in this was it necessary to decide the point; and in the decretal order made at the Circuit, it was only intended to leave this matter in precisely the same situation in which it had been left by the decision of the court, in the case of *Wamer and wife*.

If the terms of the order admit of a different or more extended construction, they must be so modified and restricted.

JOHNSTON and JOHNSON, Ch., concurred.

Edwards, for the motion.

Southern Steam Packet Company vs. Thomas J. Roger and others.

A copy left at the residence, is sufficient service of a subpoena, on a party domicilled in the State and temporarily absent therefrom, unless it is made to appear that he has been surprised.

Defendant, while abroad, being informed by his agent that some legal paper was left for him, had such notice as ought to have put him on enquiry. It was not enough that both he and his agent had forgotten the matter before his return, and that he never saw the copy writ. But the court, in the exercise of its discretion, under the circumstances of the case, permitted him to appear and defend, on payment of costs.

The provision, in the 23d Rule of court, "that a day shall be given the defendant to shew cause against" a decree, does not apply where he has, by his default, admitted the charges of the bill.

Under the 35th Rule of Court, it is in the Chancellor's discretion what evidence shall be required to prove the demand of a bill taken *pro confesso*.

Heard before his Honor Chancellor HARPER, at Charleston.

A bill was filed, by the "Southern Steam Packet Company," to compel certain subscribers to pay their shares. Among the defendants, to whom writs of subpoena were directed, was Thomas J. Roger. The copy of the subpoena writ was left at his residence in Charleston.

Several of the defendants answered; and, on the 10th December, 1838, the bill was taken *pro confesso*, for want of an answer, against others, including Roger. On the 14th January, the case was referred to the Commissioner, to hear testimony and report, and on the 28th, it was ordered, *inter alia*, "that the said Thomas Roger do forthwith pay to the Southern Steam Packet Company the sum of \$100, the amount of his subscription to the said Company, with interest from the 17th August, 1838, and costs of suit."

From this the defendant appealed; but, in the mean time, made an application to his Honor Chancellor Harper, at

Chambers, to set aside the decretal order, as well as the order to take the bill *pro confesso* ;—on the following grounds :

1. That it appears, by the return of the writ of subpoena, that it was not served on the said defendant, otherwise than by leaving a copy at his residence ; and it does not appear, that at the time of such service, he was within the State ; the fact being that he was, at the time, absent from the State, and that he never saw the copy left at his residence, until he was notified of the foregoing decretal order by the complainant's solicitors, on the 12th February, 1839. He, therefore, submits, that the service of the subpoena was void, under the second rule of court, and that he was not a party in court, against whom a decree could be made.

2. That the said decree was made without giving day to this defendant to shew cause against the same, as required by the twenty-third rule of court.

3. That the said decree was made without adducing any proofs, and without giving the defendant any opportunity of being heard upon the merits disclosed by the bill and proofs, as required by the thirty-fifth rule of court.

4. That after the cause had been referred to the commissioner, to take testimony, and report on the matters in dispute, a decree, before report made, was wholly irregular.

5. That upon the face of the bill the complainants are not entitled to a decree.

The defendant also submitted an affidavit "that he left Charleston, for New York, on the seventh day of August last, and did not return until the sixteenth day of October afterwards ; and that during the whole of the time intervening between those periods, he was constantly absent from and without the limits of this State. And he further swears, that he never saw the subpoena left for him, in this cause, until after he had received notice from the complainant's solicitors,

that a decree had been made against him, which notice was delivered to him on the 12th inst. He admits, that while at the North, he was informed by his agent, Mr. Mottet, that some legal paper was left for him, but it was not forwarded to this deponent, nor was his attention called to it, until notified of the decree, as above stated. This deponent further swears, that he has, as he believes, a just and valid defence to the complainant's demands, and asks nothing more than an opportunity to make his defence: that he is willing to plead, answer, or demur, to the bill, within a reasonable time, and if he should be advised to file an answer, then to join in the order of reference to the commissioner, made in regard to the other defendants."

An affidavit was submitted, in reply, by R. Yeadon, Junr., "that some time in July last, he wrote, as one of the firm of Yeadon & Macbeth, acting as solicitors of the Southern Steam Packet Company, the usual lawyer's letter to Mr. Thomas J. Roger, calling on him to pay his subscription to the Southern Steam Packet Company, or to refer the said firm to his solicitor, for an appearance to a suit in equity for the same, and personally delivered the letter to Mr. Roger: that not hearing from Mr. Roger, on the 17th August Mr. Macbeth issued the subpoena, which it appears, by the sheriff's return, was served, by leaving a copy at the defendant's residence; that no answer having been put in by Mr. Roger, near the close of the last term of the Equity Court for Charleston, this deponent, on reading the bill, which had been taken *pro confesso* against Mr. Roger and others, and all the answers of the parties who had answered, obtained a decree against Mr. Roger, and has since lodged an execution, to bind his property, with the sheriff of Charleston district: that the order of reference obtained by deponent, was taken by consent of the solicitors of the parties who had answered in legal time,

at period, by consent of deponent; and was, as it on its face, to settle the matters in dispute between company and such of the defendants as had answered, had no reference whatever to Mr. Roger and Mr. Boyce; the only two who had failed to answer; that deponent wrote Mr. Roger a letter, informing him of the decree, and Mr. Roger waited on him, and alledged that he had never seen the writ, (which he said had been left during his temporary absence from the city,) until after this deponent's letter; that his clerk, on its being left, had taken it to Mr. Bailey, who said there was abundant time to attend to it after Mr. Roger's return, and the clerk brought it back; but that his clerk had neglected to give it to him after his return, and that was the reason why it had not been attended to; and this deponent, as solicitor for the said company, objects to the opening of the said decree, and especially as Mr. Roger now further admits, on his affidavit, that he received notice of the suit, while at the North, from his clerk."

His Honor, the Chancellor, pronounced the following decree, overruling the defendant's motion.

This is a motion to vacate and set aside a decree, which had been obtained against the defendant, Thomas J. Roger, on a bill ordered to be taken *pro confesso* against him.

A number of persons had subscribed to form a *Southern Steam Packet Company*, and to take the number of shares set down opposite to their names, at \$500 each. The defendant had taken two shares, amounting to one thousand dollars. The subscribers, or some of them, on petition to the Legislature, were incorporated under the title by which they have sued. Some of the defendants who have answered, say as a defence, that they did not join in the application to the Legislature, and could not be made members of a corporation, without their consent.

The first ground of the motion is founded on the 2d rule of court, which is, that "all subpoenas *ad respondendum* shall be served personally, or where the defendant cannot be found, but is *within* the State, by leaving a true copy of the writ at the dwelling house, or most notorious place of residence, or habitation, of the person to whom directed." The defendant swears, that the copy of the subpoena was left at his house during his temporary absence in New York, but admits that he was informed by a letter from his clerk, that some legal paper had been left for him. This seems to be the very case contemplated by the rule, in which the service shall be by leaving a copy. In giving construction to the rule, I should be inclined to follow the decision of the Courts of Law, giving construction to the Act of 1720, P. L. 109: which provides for serving process by leaving a copy at the residence, when the defendant absconds, or is absent; provided that nothing in the Act contained, "shall extend to any person or persons gone off from this settlement, and not being actually resident in the same, at the time when the copy of such writ shall be left at the house of such person, as aforesaid."

In the case of *Lark vs. Chappel*, (1 M'C. 566) the motion was to set aside the service of process; the defendant making oath, that he was without the State at the time the copy was left at his residence. The court refused the motion, on the ground that he did not deny having received the copy writ, or say that he had been surprised, or was in danger of suffering any injury by it. This was followed by the case of *Frean ads. Cruikshanks*, (3 M'C. 84.) In this case, the defendant swears that he did not see the copy of the subpoena, until after he was informed of the decree; and that he believes he has a good defence. He admits, however, that he was informed that some legal paper had been left for him,

which was enough to put him on enquiry. It appears, from the affidavit of Mr. Yeadon, the complainant's solicitor, that he wrote, and personally delivered to the defendant, before his departure for New York, the usual lawyer's letter, requiring him to pay his subscription to the Southern Steam Packet Company, or to refer him to a solicitor for an appearance to a suit in Equity. He stated to Mr. Yeadon, that when the copy was left, his clerk carried it to Mr. Bailey, who said there would be time to attend to it after defendant's return, and the clerk carried it back. Defendant did in fact return to Charleston on the 16th of October, and the decree was made on the 28th of January, more than three months afterwards. It is possible, that the defendant may have forgotten Mr. Yeadon's letter, and the information received from his clerk, while in New York; but it is just as easy to believe, that he would have forgotten the circumstance of a copy being left. I cannot say that he has suffered any injury, from its having been left in his absence. To give the rule the construction contended for, would make it subservient to purposes of grossest laches, if not of actual bad faith.

The second ground of the motion is, that the decree was made without giving any day to the defendant to shew cause against it. The 23d rule of court directs, that "if the defendant shall not appear and defend the suit, the bill and answer shall be read; and if the court, upon hearing, shall find cause to decree for the plaintiff, yet a day shall be given for the defendant to shew cause against the same." This seems, evidently, to relate to a case where the defendant has answered, and may be supposed to have denied the charges of the bill, or to have stated some defence against them; not, as in the present instance, where he has admitted them by his default.

The third ground is, that the decree was made in violation of the 35th rule of court, directing that, in making a final

decree, when a bill has been taken *pro confesso*, the court shall require such proofs as will satisfy it of the justice of the complainant's demand. This, I suppose, must be matter for the discretion of the court. The English rule is, that when a bill is taken *pro confesso*, the plaintiff draws his own decree: or, as it is said, takes such a decree as he can abide by. The object of our rule must have been, to put it in the power of the court to guard against possible injustice to a defendant. The proof which was provided in the present case, was the agreement signed by the defendant. That was the material part. It was to be inferred, that the members generally of the company, had joined in the petition for incorporation. If the defendant could defend himself by shewing that he did not, it could scarcely be said, that injustice was done him, by compelling him to perform an agreement made with individuals, though these individuals had been transformed into a corporation. The Act of incorporation is not before me, but I suppose it, *prima facie*, includes him, as incorporating those persons a Steam Packet Company.

There is nothing in the fourth ground. The motion is overruled.

From this decree the defendants appealed, on the grounds set forth, and also on the following additional grounds:

1. That the defendant was not made a party to the suit by any mode prescribed or recognized by law; and is therefore entitled, as a matter of strict right, to vacate all the proceedings against him.
2. That in point of fact, the defendant had no notice that any suit was actually instituted against him, until he was called upon to pay the decree; and he has not, therefore, had any opportunity of contesting it at any stage of the proceedings.

3. That the decree operates as a complete surprise upon the defendant, who has been condemned without any opportunity of making his defence; although, as he is advised, he has a full and complete defence to the complainant's demands,
4. That the decree is in other respects contrary to the rules of law, and the principles and practice of Courts of Equity.

Curia, per HARPER, Ch. The Act of Assembly of 1784, establishing a Court of Chancery, (P. L. 338,) provides that, "If in any suit in the said Court, a defendant, against whom a process shall issue, shall cause an appearance to be entered thereupon, as it ought to have been if such process had been duly served, and affidavit shall be made, to the satisfaction of the court, that such defendant is without the limits of this State, or that, on enquiry at his or her usual place of abode, he or she could not be found to be served with such process," the court may direct advertisement to be made, and decree upon default of appearance; provided that if, within a time limited, the party shall petition for the purpose and pay costs, he may be admitted to make his defence. It is contended that the second rule of court referred to in the circuit decree, is repugnant to this Act. But we must suppose the court to have given construction to the Act in adopting the rule, a construction which has been acted upon ever since, by which the rights of numerous parties have been fixed, and on which they may still depend, and from which we are not at liberty to depart, whatever might be our opinion of its correctness. The Act prescribes no method of service, though certainly the only method of service previously known, was that of personal service. The rule probably regarded the leaving of a copy of the subpoena at the residence, when the party is *within* the State, as equivalent to personal service. And so

indeed it is, if, as is to be presumed, the defendant returns to his house in due time and actually receives the subpoena. If, however, the defendant should by any accident be prevented from returning till decree passed, or if the copy should be accidentally taken away, so as not to be received by him, there is no doubt but that it would be within the discretion of the court to allow him to appear and defend the suit. The court would not make its own rule the instrument of injustice. And the court might impose terms, if it should appear that the defendant's failing to receive the copy was occasioned by his own neglect or otherwise. But there may be cases in which, though the defendant should not be actually within the State, at the time of service, he would seem to come within the reason and spirit of the rule and the analogy of the cases at law. Suppose the defendant, generally residing in the State, to have accidentally gone on the particular day of service beyond the limits of the State, as is put in the case of *Lark vs. Chappell*, and to return to his house the next day and actually to receive the copy of the subpoena. Here he would have all the benefit of a personal service, and it would be trifling with the law to say that he might lie by, permit the other party to obtain his decree, and then at any distance of time, set aside the proceedings as not having been a party to the suit. And if we suppose him thus to have received the subpoena, it would hardly avail him to say he had afterwards forgotten it, any more than in the case of personal service. And so in this case, if the defendant had actually received the subpoena on his return from New York, in ample time to make his defence. He did not actually receive it, but according to the view taken in the circuit court, he was in substance and effect informed of it. If he afterwards suffered the matter to escape his memory he was guilty of neglect; perhaps not so gross as if he had been personally

served or actually received the subpoena. The court does not perceive sufficient grounds for setting aside the proceedings altogether, nor indeed does the defendant ask for it. As there was some irregularity in the manner of service, as well as neglect on his part, they suppose it to be within their discretion to allow him to appear and defend, but think this must be upon payment of costs.

It is therefore ordered that, upon the payment of costs, the decree of the Circuit Court, entered on the 28th day of January, 1839, directing the payment of \$1000 by the defendant, Thomas J. Roger, be set aside, and the said defendant be allowed to plead, answer, or demur.

JOHNSON, JOHNSTON and DUNKIN, Ch., concurred.

Bailey, for the motion. *Yeadon*, contra.

Christopher Godfrey, Administrator, and others, vs. J. W. Schmidt and J. F. Walker, Executors.

Quare,—If a man depart beyond seas and is not heard of after, whether, at the end of seven years, his death must be presumed to have occurred then, or at the time he was last heard of.

But, to quiet a title under twenty years possession, the death of one who had gone beyond seas and was never after heard of, was dated from his departure.

The presumptions arising from twenty years possession, begin to run from the commencement of the actual possession; not, (as with the statutory limitations) from the time when a cause of action accrued to the contesting party.

Presumption by lapse of time, against one who had been under a disability to sue, must rest on twenty years clear of the disability. But one beyond seas will not be considered as under any disability, so as to entitle him to a deduction of the seven years allowed him by law for prosecuting his suit.

Heard before his Honor Ch. DUNKIN, whose decree on the circuit presents a sufficient abstract of the case.

Freeman Wing, a seafaring man, left Charleston, on a voyage, in October or November, 1810, and has not since been heard of. His widow, Sarah C. Wing, held possession of his estate, consisting of a house and lot in Charleston, and some inconsiderable property, until her death, subsequent to 20th April, 1832. By her will, she disposed of the estate as her own, and the defendants are her executors. Early in January, 1838, administration on the estate and effects of Freeman Wing was granted to the complainant, Godfrey; and on the 9th January, 1838, this bill was filed on behalf of the administrator and of Nathaniel Wing, of Massachusetts, alleging that Nathaniel Wing was the father, or next of kin, of Freeman Wing, and praying an account of the personal estate and partition of the realty, with a discovery of title deeds, &c. The case was heard on the defendants's pleas of the statute of limitations and lapse of time.

Riddlehooper vs. Kinard, (1 Hill C. R. 378,) states all the doctrine applicable to this case. Mrs. Wing, the defendants' testatrix, was in uninterrupted possession of the estate from November, 1810, till April, 1832, more than twenty-one years; and those claiming under her until January, 1838. In the case cited, it is said, "The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage, or judgment, of the payment of a legacy, or of almost any thing else that is necessary to quiet the title of property." In the same case it is said, if there had been no will and no administration, the court would presume an administration, and that defendants had acquired a title from the administrator.

As was declared by Lord Erskine, in *Hillary vs. Waller*, (12 Ves. 267,) mankind must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief; and these le-

gal presumptions are sometimes made even against the fullest conviction that the fact is otherwise. But it was urged, in this case, no presumption could arise until the death of Freeman Wing, and that, as no evidence of his death was offered, the fact cannot be supposed to have taken place until seven years after his departure from Charleston, in 1810. In *Naser vs. Brockaway*, decided by Chancellor Harper, at Charleston, May 1830, it was held (as I understand,) that after the expiration of seven years, it will be presumed that the party died at the commencement of that period. The circumstances of that case are not before me: but, in *Webster vs. Buckmore*, (13 Ves. 362,) when the person last appeared he was in very bad health, and was to have returned in six months. The master's report stated the facts, and that he could not be presumed dead at the expiration of five or six years from that time. The Lord Chancellor sustained an execution on this ground, and ruled that he must be taken to have died when he was last heard from.

It is true that, in *Doe vs Judson*, (6 East, 81,) (the circumstances of which are very like this case,) Mr. Justice Rooke instructed the jury that "as to the time of the death, it was incumbent on them to find the fact as well as they could, under the doubt and difficulty of the case; that at any time beyond the seven years they might fairly presume him dead, but the not hearing of him within that period, was hardly sufficient to afford such a presumption." And Lord Ellenborough, in the same case, adverting to this presumption of death, refers the time to the expiration of the seven years. But it does not appear to me necessary to determine this question. After the lapse of twenty years every thing is presumed, which is necessary to quiet the title of property;—the death of the last owner, administration on his estate, and a title from the administrator. This period includes all those lesser

periods within which the law presumes the existence of particular facts; and is a general protection against all persons, who are not under a disability. Any other construction, as was said in *Doe vs. Judson*, would extend indefinitely the period for prosecuting claims. And this is also a reply to the objection, that as to the personalty, the cause of action did not arise until the time of granting administration. In *Riddlehoover vs. Kinard*, the court says this applies only in respect to the statute of limitations, and not when the presumption is to be considered from lapse of time.

Then as to the realty. In *Gray vs. Givens*, (1 Hill C. R. 511,) it was held, that after twenty years exclusive possession, by one tenant in common, an ouster of his co-tenant would be presumed, and the right to partition barred. If the intestate died in 1810, the complainant was barred in 1830, during the lifetime of Mrs. Wing. But if his death be fixed at the end of seven years after the last intelligence of him, the complainant was barred in October, or November, 1837, two months prior to filing his bill. It was said, however, that the complainant having been beyond seas, when his rights accrued, was entitled to seven years to institute his action, and that, in computing the lapse of time, this period must be deducted.

In *Gray vs. Givens*, the court say, "the time during which the party to be affected has been under a disability, must be deducted, in computing the lapse of time, in analogy to the statute of limitations."

But the Act does not regard an absentee beyond seas, as under a disability, like an alien enemy, a minor, &c. Our courts are open for the prosecution of his rights; no impediment is thrown in his way: but, in consideration of his position, two years longer are allowed to him than to a resident of the State. See *Forbes vs. Foot*, (2 M'C. R. 331.)

It is ordered and decreed, that the bill be dismissed.

The complainants appealed from the decree of his Honor, the Chancellor, and moved for a new trial, on the grounds that they were entitled to an account of the personalty and partition of the real estate, and were not barred by time.

Curia, per JOHNSON, Ch. From a document produced at the hearing of the appeal, it is plain that Freeman Wing was alive three or four months subsequent to the period assumed in the circuit decree. But from the view taken by this court, the difference is not material. The general principle stated in the decree is recognized by this court, to wit, that "after the lapse of twenty years, every thing is presumed which is necessary to quiet the title of property—the death of the last owner, administration on his estate, and a title from the administrator." Mrs. Wing was in the quiet and undisturbed possession and enjoyment of the estate, from February, 1811, till her death in April, 1832. The present claimant has, during that time, been under no legal disability. The general rule must then be applied. Appeal dismissed.

HARPER, JOHNSTON and DUNKIN, Ch., concurred.

Hunt & O. M. Smith, for the motion. *Memminger & Jervy*, contra.

Job Palmer vs. The Legatees of Samuel Miller.

A testator's executor married the widow of the deceased; to whom a life estate in a vacant lot had been devised, to commence at her eldest child's coming of age. After marriage and before the life estate commenced, the executor erected buildings, out of his own funds—there being none of the estate—on the lot, and afterwards, as tenant *per autre vie*, enjoyed the same for many years, till the wife's death. The improvements being permanent, and at the time of erection likely to be beneficial, *Held*, that the executor was entitled to remuneration.

He was entitled to the value of the improvements as they stood, when the estate left his hands, that being less than the amount expended, and it appearing that his profit out of the estate had not been as much as the interest on his money.

Samuel Miller, by will, ordered that his whole estate should be kept together, for the joint use and maintenance of his wife and children, until his eldest child should come of age. Then, *inter alia*, he devised a certain vacant lot in Charleston, to his wife for life, remainder to his surviving children, or their issue. The testator died in the year 1789, leaving Job Palmer his executor: who, shortly after, married the testator's widow, and out of his own funds, without any order of court, put buildings on the lot, and had possession till 1832, when his wife died. The residuary legatees then claimed the lot, but Palmer claimed, first, to be paid the value of his improvements.

The case was heard in the first instance before the late Hon. Ch. DeSaussure, whose decree, based on the proposition that Palmer, the petitioner, was not entitled to remuneration, was reversed by the Appeal Court. The opinion of the court (by O'Neill, Ch., with the concurrence of Johnson and Harper, Ch.) so far as concerns the matter of the present appeal, was as follows:

I agree that, generally, a tenant for life is not to be paid for improvements; but to that rule there may be exceptions, as

is the case, where a tenant for life goes on and finishes buildings left by the testator in an unfinished state. *Hibben vs. Cook*, (1 Cond. Rep. 281.) The reasons of that exception may be useful to us here; they certainly are twofold, first, that it is beneficial to the remainder; and, second, the implied intention of the testator, from the state of the property, *its unfinished condition*, that it should be finished out of his estate, in order to render it useful to both the tenants for life and the remaindermen. In the case before us, both of these reasons apply directly; it is alledged that the improvement was a beneficial one to all concerned, and it is manifest that the lot was most probably useless to the tenant for life, unless it was improved. We should, therefore, perhaps, (were it necessary to do so,) be authorized to presume, that the testator's intention was, that the lot should be improved, as well for the use of the tenant for life, as of the remaindermen. But it is not necessary to resort to the doctrine between tenants for life and in remainder, in order to decide the question. For the house and other improvements were made in 1799, 6 years before the petitioner's wife's life estate commenced. He built as executor, and under the advice of the Ordinary.

In *Inwood vs. Twyne*, (2d Eden, 152,) Lord Chancellor Northington stated the rule which always governs this court, in passing upon the acts of trustees. He said, "I conceive many cases where a conversion of such estate, (personal into real,) might be made by trustees, or guardians, and that this court would support and approve their conduct, and it would be strange to say that trustees would be censured in this court for doing what the court would have ordered to be done."

Under this rule, the question is, were the improvements such as the court would have authorized the executor to make? This would have depended on the fact, whether it would have been beneficial to all concerned, as devisees. On

looking back to Mr. Miller's will, I perceive that he has directed all his estate, real and personal, (after payment of his debts,) to be kept together, for the joint use and maintenance of his wife and children, until his son Job arrived at the age of 21 years. This, I think, constituted a strong reason for improvement of the lot. While vacant, it would be unproductive capital; when improved, its rents and use might contribute to the purposes of the trust, for the widow and her children. But the fact that it might have been such an improvement as the court would have ordered, is a ground to retain and submit the question to the examination of the commissioner.

In *Myers vs. Myers*, (2 McCord C. R. 267,) the defendant, an executor, was allowed for improvements on the trust estate, on the ground that it was for the benefit of his *cestuique trust*. The petitioner seems to me to be entitled to the benefit of the same rule. He made the improvements, as executor, and if they were such as were beneficial to the estate, and such as a prudent man, the owner of such an estate as Mr. Miller's, would be willing to make, then the petitioner is entitled to compensation.

But he is not entitled to more than the present value of the improvements, to be ascertained by the enhanced value which the said improvements have given to the lot. If the income from the house and lot, from its erection, (as the former decree allowed Mr. Palmer to retain the whole, without an account,) should, on the reference, appear to have been more than the interest on the sum of money expended by Mr. Palmer in making the improvement, and the costs of necessary repair, then such excess shall be deducted from the present value of the improvements.

It is ordered and decreed, that Chancellor DeSaussure's decree be reversed, and that it be referred to the commis-

sioner, to ascertain and report, whether the said improvements were beneficial to and proper for the estate, and if so, then the amount to which the petitioner is entitled, on account of the said improvements, on the principles and according to the directions contained in this opinion.

The Commissioner reported the cost of the improvements, with repairs, taxes and insurance, \$6,686, 28; that they were of permanent value, and beneficial and proper for the estate; that interest estimated on the money expended by the petitioner would exceed the income of the property, so that nothing was to be deducted from the amount to which the petitioner was entitled; that the lot and buildings were appraised at \$3,500, and the lot if vacant, at \$1200, and therefore, that the value of the improvements was \$2,300.

This report was brought up before Johnson, Ch., who directed the commissioner to report, further, what were the available funds of the testator at the time the petitioner erected the buildings, and whether, at the time, there was a reasonable prospect that the improvements were beneficial to the estate, and would produce a fair interest.

The Commissioner returned that there were no funds, and that there was a prospect that the buildings would produce a fair interest. And, further, that all the buildings were consumed in the great fire of April 27, 1838.

Upon this presentment of facts, the Hon. Ch. Harper made the following decree, in January, 1839.

The decrees already made, and the reports of the commissioner, make a statement of the case. I have now to decide on the exceptions to the present report. The decree of the Court of Appeals, of 11th March, 1835, directed the commissioner to ascertain and report whether the improvements were beneficial to and proper for the estate, and the amount to which the petitioner was entitled, on account of these improvements. He reported that there was due to the petitioner

the sum of \$2,300. By the order of Chancellor Johnson, it was referred back to the commissioner to report what were the available funds of the estate at the time, and whether there was at the time a reasonable prospect that the rents would equal the interest on the sum expended. He has reported that there were no available funds of the estate at the time, and that at the time there was a reasonable prospect that the rents would exceed the interest on the amount expended.

The principal arguments in support of the exceptions, are, that it could not be prudent to run the estate in debt, by extensive improvements, when there were no available funds, and that the result has shown that they were not beneficial, inasmuch as the interest on the amount invested, according to the account reported by the commissioner, has far exceeded the amount of rents.

According to the reasoning of the decrees, and the general doctrine on the subject, that the court will sanction such acts of a trustee, as it would clearly have authorized, if application had been made to it beforehand, it is necessary to carry the mind back, and consider the case as it would have been considered, if such application had in fact been made. Suppose then, that Mr. Palmer had in fact made application to the court, in 1799, stating that the lot was unproductive, that there were no available funds of the estate, but that he was willing to advance the money out of his own funds. Suppose him to have shewn, (as there is no doubt he might have done,) that the rent would probably exceed the interest, and afford a prospect of re-imbursing the expenditure; suppose him to have offered, if the rents should not amount to the interest, to lose the excess of interest, and at the end of the life estate, to receive only so much as the buildings, however dilapidated, should then add to the value of the lot. Is there any doubt, but that the offer would have been eagerly accepted, as most beneficial to the estate, as one by which it might

gain much, but could lose nothing? But these are the very terms which the court has imposed on him, and sanctioned his act upon such conditions. This would have been much more favorable to the estate, than, if he had funds lying at interest, to have withdrawn them, and vested them in improvements. There is no danger of trustees being led to an abuse of their trust, if their acts are only sanctioned upon such conditions. The legatees are brought in debt, but they have value to the extent of their debt, and an estate from their ancestor to pay it.

In point of fact, for several years after the improvements were made, the rents did exceed the interest. Down to 1800, I find that the petitioner had been re-imbursed about £60 of the principal of his disbursements, beyond the interest. The subsequent fall of rents, I suppose, is to be attributed to the war, and the general decadence of Charleston in commercial prosperity. In 1803, it appears that the premises rented for £98 19 2; in 1833, for £25 16 9. The evidence is, that they were in good repair when delivered up to the remaindermen, in 1834. But is a trustee who has acted faithfully, honestly and judiciously, to be made responsible for the fluctuations of public prosperity?

With respect to the second exception, it is hardly necessary to say, that the rights of the parties are to be determined as they stood when their estate accrued, as they have in fact been decided by the decree of the Court of Appeals. It is their misfortune that their property has been consumed by fire, but a misfortune common to many others. It was in their own possession, and certainly it would be singular to make their former trustee liable for that loss.

It is ordered and decreed, that both reports of the commissioner be confirmed, and that the respondents pay to the petitioner the sum of \$2,300, reported by him, with interest from the 10th of July, 1835.

The defendants appealed, on the following grounds;

First. That there was not evidence sufficient to warrant an executor to incur a debt against the residuary legatees, without any authority from the court, upon the mere speculation that the cost of building would, in time, be extinguished by the rent; and more especially, as the rents were solely the right of the tenant for life, and only accrued to those in remainder, after the buildings became old; at which time the remainder-men are to be compelled to pay in advance for old buildings, upon the speculation that the rent must, in time, repay them.

Second. Inasmuch as the improvements, pending this controversy, have been destroyed by fire, the remaindermen are not bound to pay for buildings they never agreed to purchase, and which are no longer in existence.

Third. Because the evidence required the commissioner to report, that the estate had no funds to invest, and that it was altogether unauthorized in the executor, who was also husband of the tenant for life, to charge the remainder-men, at some future and contingent period; if such can, at any time, be a prudent exercise of the authority of an executor.

Curia, per HARPER, Ch., There are some facts connected with the proceedings in the cause which were not brought to the view of the court below.

It appears that, after the filing of the petition of Complainant to be re-imposed the expenses of the buildings, a suit, for partition of the estate of Samuel Miller, was brought by Ann E. Thompson against the Complainant and the other defendants to the present suit. A writ of partition was ordered, and the commissioner recommended a sale of the real estate. In June, 1834, a sale was made, and the house and lot in question was bid off by the present defendants, at the price of \$3,450, who gave their bond to the master, with a mortgage of the premises, to secure the purchase money. In May, 1835, an order was made by Chancellor DeSaussure,

that the proceeds of the sale of the house and lot then in the hands of the master of this court, should remain with him subject to the future order of this court. Some years after the sale, the house, in the possession of the defendants, was consumed by fire. The decree of the Appeal Court, of 1835, determined that the Complainant was entitled to be re-imbursed the expenses of the improvements, so far they added to the present value of the estate, and that decree is conclusive upon the parties and upon the court.

The decree still seems to us to be sufficiently supported by authorities, and founded upon the plainest principles of equity. At that time, the defendants were suing at law to recover possession of the property. By resisting the Complainant's demand, their claim was to put into their own pockets so much of the Complainant's money, as the improvements added to the value of the lot ; thus gaining an inequitable advantage against which the courts of law would afford no remedy.

There are cases in which an executor would be allowed the entire amount of his expenditures in improvements, although, from some unforeseen cause, they should turn out to be of little or no value. As, in the case put, of his having money in his hands, and real estate entirely unproductive. If, to all human reason, they were judicious and advantageous to the estate at the time, there is no reason why he should bear the loss, although, from unforeseen casualty, they should afterwards become deteriorated in value. But perhaps it is proper that, when the executor borrows or advances money for the purpose of making the improvements, and this has been done without the previous sanction of the court, the court should do what has been done in this case, and restrict his re-imbursements to the amount which the improvements added to the actual value of the property, at the time the Legatee is entitled to possession. Otherwise, the objection

might be made, that the Legatees might be brought in debt beyond the value of the estate they receive. Yet this is but hard measure to a Trustee, who has acted judiciously and faithfully, where the devisee takes from his ancestor or testator, an estate which, altogether, is much more than sufficient to re-imburse him. But, when he is restricted to the actual value, it should seem impossible that the objection could apply. If the entire value of the property, and the relative value of the land and of the improvements, be truly fixed, there is nothing to do, but to sell the property and to divide the proceeds according to the rights of the parties.

It is urged that the estimate of witnesses is an imperfect method of fixing the valuation of property. It might be said, that if the evidence of value on one side is imperfect, it is the business of the other party to produce the proper evidence. In some cases, however, it might be proper to bring the matter to the test of experiment, to direct a sale, and then to divide the proceeds according to the best evidence of the relative value. The Court cannot do so *now*, in this case. The property has been sold, and bid off by the defendants, at a price within a trifle of the value fixed by the witnesses. This strongly confirms the judgment of the witnesses. I must suppose that they bid so much more on account of the improvements. Is it not plain then, if they are allowed to keep the entire property and pay nothing, they put into their pockets so much money of the complainant, to which they have no shadow of a claim? But the house has been burnt down. But it was burnt after the entire property had become theirs, not only by the will of the testator, but by their own voluntary act. Men must bear their own misfortunes. If there was any neglect, in failing to insure, it was that of the defendants. It would be as reasonable, if they had purchased the property of another, to claim to be relieved from the payment of their bond, on the ground that

the property had been destroyed in their possession, as to claim a similar exemption in this case.

The decree is affirmed.

JOHNSON, DUNKIN and JOHNSTON, Ch., concurred.

Hunt, for the motion.

Daniel Jacot vs. James Corbett, Howland, Ward & Taft et al.

Assignment, by a debtor, for benefit of such creditors as should accept a rateable proportion, but not to exceed 40 per cent, of their claims; the surplus, if any, to be returned to the debtor. *Held*, under all the circumstances of the case, to be fraudulent and void under stat. 13 Eliz.

Heard, at Charleston, before His Honor Ch. DUNKIN, who decreed as follows :

The defendant, James Corbett, being indebted to the complainant, a merchant of New York, in the sum of \$10,898, a suit was instituted, for the recovery of the debt, in the Circuit Court of the United States, on 1st October, 1838; judgment was entered on 29th November, 1838, on which execution has issued, and been returned *nulla bona*. On 19th November, 1838, James Corbett executed a general assignment of his estate and effects to his co-defendants, Howland, Ward & Taft. After premising his insolvency, his desire, for reasons which he considers binding in conscience, to pay or secure some of his creditors in full, and to pay or secure 40 cents in the dollar to his other creditors, if they would accept the same in full satisfaction and discharge of their demands, which he is satisfied is as much as his estate, except under the most judicious management, would pay, "but that, by reason of some of the creditors commencing suits against him,

which are now pending, it is impossible for him to secure to all his creditors the benefit of such an arrangement," without making an assignment of his estate and effects, for that purpose, it is declared that the stock in trade, slaves, &c., shall be sold by the assignees, at their discretion ; with power, out of the sales, to make new purchases and add to the stock, so as to render the remaining stock more saleable; and then, after paying the expenses of the trust, commissions to the assignees, and the preferred creditors, "out of the surplus, to pay to all "the other creditors, who would accept the same, in satisfaction of their demands, and execute a release thereof to the "said James Corbett, by the first January next ensuing the "date thereof, 40 cents in every dollar of the amount of their "claims, if the same was adequate thereto; and if not, to distribute such surplus rateably, and in proportion, among such "creditors. And after payment of the said 40 cents in every "dollar, then if any surplus should remain, (which the said "James Corbett by no means expects, unless the assignees "and creditors should avail themselves of his skill and services in disposing of the said effects,) to pay over the same to "the said James Corbett, his executors, administrators, or assigns." The preferred debts amounted to \$21,021; those not preferred, to \$32,483. Some of the creditors not preferred, to the amount of \$12,056, accepted of the the terms of the assignment: others, to the amount of \$20,426, among whom is the complainant, did not become parties to the arrangement.

At January term last, this cause was heard by Chancellor Harper, on a motion for injunction, to restrain the assignees from appropriating the funds according to the trusts of the assignment; and, on 15th February, an injunction was granted, for the reasons stated in the decree.

The general right of a debtor to make a preference among his creditors, is not questioned. Corbett was indebted to the complainant in the sum of 10,898 dollars, for goods sold and

delivered. He was indebted to his assignees in the sum of 6,207 dollars, also for goods sold and delivered. By the terms of distribution, the latter debt is to be paid in full, and less than 40 per cent. is left for the other creditors. This seems inconsistent with the maxim, that equality is equity. Yet the right is well settled; and it is not less certain that, if the right were more doubtful, the successful exercise of the power could not be prevented. The principle is recognized by Chief Justice Marshall, in *Brashear vs. West*, (7 Pet 614,) "the preference given," says he, "to favored creditors, though liable to abuse, and, perhaps, to serious objections, is the exercise of a power, resulting from the ownership of property, which the law has not yet restrained. It cannot be treated as a fraud." The objection of this complainant is of a different, and more formidable character. The assignment is said to be obnoxious to the stat. 13 Eliz. which declares all conveyances made with the purpose and intent to delay, hinder, or defraud, creditors, "to be clearly and utterly void, frustrate, and of none effect." In *Cadogan and Kennett*, (Cow. 434,) Lord Mansfield, commenting on the stat. 13 and 27 Eliz., says, that the principles and rules of the common law, as now universally known and understood, are so strong, that the common law would have attained every end proposed by the statutes. He says, also, "these statutes cannot receive too liberal a construction, or be too much extended, in suppression of fraud;" and further, "if the transaction be not *bona fide*, the circumstance of its being done for a *valuable consideration*, will not alone take it out of the statute." It is very possible, (and the court would readily adopt that conclusion,) that Mr. Corbett may not have conceived that he was doing an improper act; yet, if he has done that, the intent and purpose of which was to hinder and delay his creditors, the law has affixed a character to the transaction, and declared it, as to such creditors, void, and of no effect. The complainant was prosecuting a

legal remedy for a just debt. The defendant, advertent to these proceedings, and the expediency of providing against the effect of them, makes a general assignment of his estate, ten days before the entry of the complainant's judgment. By the provisions of this assignment, no unpreferred creditor is, in any event, to receive more than 40 per cent. on his debt, and no such creditor is to receive any thing, unless he will execute a release, be the dividend what it might, within six weeks after the date of the assignment. The surplus, after payment of 40 per cent. to the releasing creditors, is to be paid to the assignor. On the part of the defendant, it was urged that the assigned effects would not pay more than 40 per cent. to the unpreferred creditors, and a statement, to that effect, was submitted to the court. The character of the transaction must be determined by the interest of the parties, at the time, and not by subsequent events. If the defendant did not believe, and contemplate, that the assigned effects would realize more than 40 per cent. on the general or unpreferred debts, it is difficult to imagine for what purpose he fixed that amount, as the maximum consideration of the release to be executed; or why, as in ordinary assignments, the surplus, be it what it might, after payment of the preferred creditors, was not made distributable among such of the general creditors as should not execute a release of their demands. Some cases were brought to the notice of the court, and especially that of *Lynah vs. Lynah*, decided at Charleston, April, 1828, and *Murray vs. Riggs*, (15 John. 571,) in which it had been held, that a certain sum, reserved by the assignment, for the use of the assignor, did not vitiate the deed. In a subsequent case of *Mackie vs. Cairne*, (5 Cowen, 563,) Judge Sutherland says, that the question in *Murray vs. Riggs*, was, "whether the reservation, by a debtor, of a moderate portion of his property, for the maintenance of his family for a limited time, in a general assignment, for the benefit of his credi-

"tors, shall, in all cases, be conclusive evidence, in judgment of law, of an intent to delay, hinder, and defraud, his creditors, within the meaning of the statute of frauds, so as to vitiate and destroy the whole conveyance." The decision in *Murray vs. Riggs*, restricted as it was, seems, from the subsequent cases, to have been rather treated as an exception to the general rule, or principle. *Lynah vs. Lynah*, regarded in the strongest point of view, for the defendant, does not proceed farther. *Estwick vs. Caillaud*, (5 T. R. 420,) was also cited; in which Lord Abingdon assigned his mansion house, park and pleasure grounds, together with the deer, cattle, &c., in trust, to receive the rents and profits, and pay one half to the grantor during his life, and the other moiety to Miss Barbara Harvy, and certain other scheduled creditors. Townsend, whose father had built a house for Lord Abingdon, obtained a *fi. fa.*, under which, part of the assigned estate was seized. In an action of trespass, it was held, that the deed of Lord Abingdon was valid. Attempts have been frequently made to reconcile this decision with the principles of the stat. 13 Eliz. In some cases, it has been observed, that the deed was sustained, because only a part of Lord Abingdon's estate was included in the assignment, and that he had, in fact, pointed out to his debtor other property, from which he might satisfy his demand. It has been elsewhere said, that "the report of that case developes one of those contrivances by which the nobility of England put their estates at nurse; so that they may recruit without being harrassed by importunate creditors. The effect of that decision, was to allow Lord Abingdon to enjoy his mansion house, park and pleasure grounds, to permit him to make presents of his deer, and run his horses at New Market, while his creditor, who had built the house, and whose debt had been due for more than twenty years, was obliged to look on, with his execution in his hands." It may, perhaps, be added, that when Townsend

applied to the Court of Chancery, on the ground that the deed, if not void in toto, by the stat. Eliz., at least must be void, as to that moiety reserved to Lord Abingdon, as against his creditors, he was told by Chief Baron Macdonald, that Courts of Equity had never interfered in a similar case; 2 *Anst.*: 384. It is, perhaps, questionable, whether either of the decisions cited, could be maintained upon general principles, apart from the special circumstances of the particular case. Doubtless, a debtor may make a general assignment of all his estate, for the benefit of his creditors. He may prescribe the order in which they shall be paid. I think, too, that he may prescribe the condition of a release, although, if this were *res integra*, the Supreme Court have said, in *Brash-ear and West*, (7 Peters,) "we are far from being satisfied, that upon general principles, such a deed ought to be sustained." But a debtor has no right to place his property beyond the reach of his creditors, under the ordinary process of the law, prescribe the terms on which they participate in his effects, and secure to himself, in case of neglect, or refusal, a control over such funds, and thereby, the power to make other terms. Such deed is a direct violation, as well of the terms, as the policy, of the statute. The purpose is to hinder and delay creditors, by transferring a colorable title to a third person, while the real ownership is still in the assignor, unless the terms prescribed are assented to. No case, I think, can be found, sanctioning an assignment which sustains such control in the debtor. In *Hislop vs. Clark*, (14 John. 462,) the Supreme Court of New York, recognizing, in the fullest extent, the right of giving a preference, declared an assignment fraudulent and void, in judgment of law, which secured to the assignor this contingent control of his estate. "It does not actually," says Judge Van Ness, "give preference, but is, in effect, an attempt, on the part of the debtors, to place the property out of the reach of their creditors, and to retain the

“power to give such preference at some future period.” According to the statement submitted to the court, if this assignment is sustained, the debtor, Corbett, will have coerced creditors, to the amount of 12,000 dollars, to receive about 5000, in discharge of their demands, and secured to himself 8000 dollars, to make terms with the remaining creditors. In the case of Hyslop and Clark, the court demonstrate the inadequacy of the relief, by an application to this court, for the fund reserved to the assignor; and then proceed to say, “but whether they could obtain relief there, or not, is quite immaterial in this case. An insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it under the process of a Court of Law, and to drive them into a Court of Equity, where they must encounter great expense and delay, unless it be under very special circumstances, and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution to be made amongst them all.” In the same case, the argument is considered, that the assignment should be sustained, at least so far as it protects the preferred creditors. After stating that the better opinion seems to be, that *even at common law*, such deed is altogether void, and that a grantee, who voluntarily becomes a party to it, justly forfeits his right to claim a benefit from another part of the deed, that would otherwise have been good, the court admits that there is some diversity in the authorities, and they regret any departure from principles, the firm energetic enforcement of which, is so important to the protection of the rights of creditors. But they shew, upon undisputed authority, that where a deed is void in part, *as against the positive provisions of a statute*, the whole deed is void.” The court add “that if the whole of a conveyance made in violation of the statute, is not held to be void, merely because it may be good in one particular, it would be very easy to elude the statute in every case. One good trust

might always be inserted," &c. The authority of *Hyslop vs. Clark*, was distinctly affirmed in the subsequent case of *Austin vs. Bell*, 20 John. 448, in which, by the terms of the assignment, the shares of the creditors, who declined to accept, were expressly reserved to the assignors themselves. Chief Justice Spencer, delivering the judgment of the court, says, "without, in the least, impugning the doctrine that a man in debt has a right to give a preference to creditors, I am bound to say, that a deed which does not fairly devote the property of a person overwhelmed with debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, and defraud creditors of their just and legal actions." In *Mackie vs. Cairns*, to which the court has already adverted, the cases were reviewed by the Court of Errors, and, perhaps, it is not too much to say, that by the unanimous judgment of the court, an assignment, containing a provision of this character, would be deemed fraudulent and void, as to creditors, though valid as between the parties. (5 Cowen, 585.) In *Niolson vs. Douglass*, (2 Hill's C. R. 444,) the objectionable feature of the assignment was the compulsory release. The deed was sustained. But if the opinion of the Chancellor, who pronounced the judgment, may be supposed to have had the sanction of the court, a reservation to the assignor, secured by express provision, in the event of non acceptance by the creditors, would have vitiated the assignment.

Upon the whole, I am of opinion, that the assignment of James Corbett to his co-defendants, Howland, Ward & Taft, is, as against the complainant, void, and of no effect. From the statements exhibited, it was manifest that the funds received by the assignees, from the goods and chattels subject to the complainant's execution, were more than

sufficient to discharge his debt, after paying off the amount due on the execution of R. Pennall.

It is ordered and decreed, that the defendants, Howland, Ward & Taft, pay to the complainant, from the funds in their hands, received under the assignment, the amount due on his judgment, to wit, the sum of \$10,898, with interest from 29th November, 1838, and that from the same funds they pay the costs of these proceedings.

Grounds of Appeal:

1. That the deed of assignment is not fraudulent.
2. That there is no fraud nor default in the creditors, whose debts are secured by the said deed. That it is inequitable to deprive a *bona fide* creditor of his security; and the decree, in this particular, should be reversed.

Curia, per DUNKIN, Ch. This court concur in the conclusions of the Chancellor.

It is therefore ordered and decreed that the decree be affirmed and the appeal dismissed.

HARPER, Ch., concurred.

JOHNSTON, Ch., I concur in the result, but not without hesitation.

JOHNSON, Ch., I am not prepared to concur entirely in this judgment. When, as in this case, there are various considerations for a deed proceeding from different persons, some good and some bad, I doubt whether it may not be sustained as to those that are good, although void as to the rest.

Whitemarsh B. Seabrook, Administrator, vs. Elizabeth Mikell, Wm. M. Murray and others.

Devise to two sons for life, with remainder to their issue, and, "in case my *surviving* son shall depart this life" without issue, remainder over. These words, by necessary implication, create cross remainders between the sons; as much so as if it had been "in case both my sons" &c.

And, although there was an express limitation to the survivor, if either of the sons should die *under age, without issue*; which would appear to preclude such a limitation if he should *come of age* and then die without issue; yet, it seems, the implication was not the less necessary in that case.

Devise to two sons for life, as tenants in common, the share of each in remainder to his issue, "but in case either of said sons should depart this life under age, without leaving any child or children living at his death." *Held*, that the testator meant "under age or without," &c., and on the death of one, without issue, *after coming of age*, the limitation to the survivor was effectual.

Heard before Ch. HARPER, January, 1839.

This was a bill of Interpleader, filed by the complainant, Whitemarsh B. Seabrook, executor of the last will and testament of Joseph James Murray, deceased, and administrator of James Joseph Murray, against the heirs and devisees of the testator.

Joseph James Murray, who died on the 18th July, 1818, by his last will disposed as follows:

"I give and devise unto my two sons, James Joseph Murray, and Wm. Meggett Murray, during their natural lives, as tenants in common, all that my plantation, or tract of land, on Fenwick's Island, in the parish of St. Bartholomew's, in the state aforesaid, containing about 1200 acres of high land, and about 3692 acres of marsh land, to be equally divided between them, share and share alike, on their severally arriving at the age of twenty-one years, or day of their marriage, which shall first happen; and should either of my said sons depart this life, leaving any child or children, grand-child or grand-children, lawfully begotten, living at his death, then I give and devise the part, share, or proportion of the one so dying, to such

child or children, grand child or grand-children, his, her, or their heirs and assigns forever, if more than one, as tenants in common, such grand-children standing in their parents' stead, and taking between them only their parents' share. But in case either of said sons should *depart this life* UNDER AGE, *without leaving any child or children*, grand-child or grand-children, lawfully begotten, living at his death, then I give and devise his moiety of the said land unto my surviving son, during his natural life, and after his death, in case *he should leave any child or children, grand-child, or grand-children*, lawfully begotten, living at his death, then I give and devise the said *moiety* of the said land, to such child or children, grand-child or grand-children, his, her, or their assigns forever, if more than one, as tenants in common, such grand-child or grand-children standing in their parents' stead, and taking between them only their parents' share; *and in case my surviving son should depart this life, leaving no child or children, grand child or grand-children, lawfully begotten, living at his death*, then, and in that case, I give and devise my said plantation or tract of land, to such of my daughters, and the child or children, grand-child or grand-children, of a deceased daughter or daughters, as may be living at the death of my said surviving son, in manner and form following, that is to say: To a surviving daughter or daughters, during their respective natural lives as tenants in common; and after their respective deaths, in case any of my said surviving daughters should leave any child or children, grand-child or grand-children, living at her death, then to such child or children, grand-child or grand-children, his, her, or their heirs or assigns forever, as tenants in common; such grand-children standing in their parents' stead, and taking between them only their parents' share; and to the child or children, grand-child or grand-children, of a deceased daughter or daughters, his, her, or their heirs or assigns forever, if more than one, as tenants

in common, such grand-children standing in their parents' stead, and taking between them only their parents' share.

" *Item.* I give and bequeath all the stock of cattle, owned and possessed by me, or which shall be on Fenwick's Island aforesaid, at the time of my death, unto my said two sons, James Joseph Murray, and Wm. Meggett Murray, when they shall arrive at the age of 21 years, or day of marriage, which shall first happen, their executors, administrators, or assigns, in trust to and for the joint use, benefit and behalf of my said beloved wife, Martha Mary Murray, and her family, during her natural life, should she so long remain my widow; but should she at any time hereafter marry, or from and immediately after her death, then I give and bequeath the said stock to my two sons, James Joseph Murray and William Meggett Murray, their executors, administrators, or assigns, to be equally divided between them, share and share alike; excepting in the event of either of my said two sons departing this life, leaving no child or children, grand-child or grand-children, lawfully begotten, living at his death, in which case, I give and bequeath the whole of my said stock to my surviving son, his executors, administrators, or assigns.

" *Item.* I give, devise, and bequeath unto my said beloved wife, Martha Mary Murray, and unto my said eight children, herein before named, all the rest, residue, and remainder of all *other property*, either real or personal, which now, or at any time hereafter, I have or may be possessed of, during their respective natural lives, as tenants in common: and after the death of my said wife, I give, devise, and bequeath the part, share, or proportion of the said rest and residue of my estate, which she shall derive under this my last will and testament, to such of my children or grand-children, as may be living at her death, in manner and form following, that is to say, to my children during their respective natural lives, as tenants in common, and after their respective deaths, to their children,

their heirs, and assigns forever, as tenants in common; and to my grand-children, living at her death, their heirs and assigns forever, if more than one, as tenants in common, such grand-children standing in their parents' stead, and taking between them only their parents' share; and after the death of any of my said children, the share or proportion of the said rest, residue, and remainder of my estate, shall go to the child or children, grand-child or grand-children, of such deceased child or children, as may be living at his, her, or their death, to them and their heirs forever, as tenants in common, such grand-children standing in their parents' stead, and taking between them only their parents' share; and in case any of my said grand-children should depart this life, leaving no child or children, grand-child or grand-children, living at his, her, or their death, then the share or proportion of the said rest, residue, and remainder of my estate, which such child shall derive under this will, shall go to my surviving children, and the child or children of a deceased child, as representing their parents, to them and their heirs forever, as tenants in common.

“And lastly. I hereby nominate and appoint my worthy friends, Wm. Crosskeys Meggett, Benjamin Seabrook, and Whitmarsh Benjamin Seabrook, Esqs., of Edisto Island, and my son James Joseph Murray, executors of this my last will and testament.”

The bill further set forth, “that the said testator left surviving him, his daughters, Elizabeth Crosskeys Mikell, the wife of Josiah Mikell, Martha Mary Murray, Abigail J. Murray, Susan Murray, and Margaret Murray, and his said two sons, James Joseph Murray and William Meggett Murray: that your orator and the said Wm. Crosskeys Meggett, qualified as executors of the said will, and administered the estate of their said testator, in pursuance thereof; that the said plantation on Fenwick's Island, devised, as aforesaid, to his said

two sons, J. J. Murray and Wm. M. Murray, was divided between them, and the share of each delivered to him; and the said stock of cattle, was also divided between, and delivered to them, the said J. J. Murray and William M. Murray. That since the death of the said testator, the said Josiah Mikell has departed this life. That the said Martha Mary Murray intermarried with John Hanahan, and died intestate, leaving surviving her, the said John Hannahan, Martha Mary Hanahan, Abigail Hanahan, and Susan Hanahan. That the said Abigail J. Murray intermarried with Wm. M. Clark, and died intestate, leaving surviving, her husband, the said Wm. M. Clark, and their daughter, Martha Mary Murray Clark; and the said Wm. M. Clark has since also died, leaving surviving him, his said daughter, Martha Mary Murray Clark, and two children by a second marriage,—James Joseph Clark, and Elizabeth Jenkins Clark, and a widow, Elizabeth Mary, (who has since intermarried with the said John Hanahan,) and leaving a last will and testament, whereby, after several specific devises and bequests, he devised and bequeathed the residue of his estate to his said widow and children. The said Margaret Murray intermarried with John Seabrook, and died intestate, leaving surviving her, the said John Seabrook, her husband, and five children, namely,—Josephine Seabrook, Whitmarsh Seabrook, Joseph Dill Seabrook, Wm. James Seabrook, and Ephraim Mikell Seabrook, and the said Susan Murray has intermarried with James Meggett. And your orator further shews, that the said James Joseph Murray, and his wife and children, were on board of the Steam Packet Pulaski, when she was lost at sea, on the night of the 14th of June, 1838, and all perished on that mournful occasion:—that the said J. J. Murray died intestate, leaving surviving him, his sisters, the said E. Crosskeys Mikell, and Susan Meggett, (the wife of James Meggett,) his brother, the said Wm. M. Murray, the said John James Hanahan, Martha Mary Hanahan,

Abigail Hanahan, and Susan Hanahan, the children of his deceased sister, Martha Mary, the said Martha Mary Clark, the only child of his deceased sister, Abigail J., and the said Josephine Seabrook, Whitemarsh Seabrook, Joseph Dill Seabrook, Wm. James Seabrook, and Ephraim M. Seabrook, the children of his deceased sister, Margaret; all the children of his deceased sisters being infants under the age of twenty-one years. And your orator further shews, that at the instance of the next kin of the said J. J. Murray, he took out letters of administration of his estate and effects, and has taken possession of the same; that as the slaves of the said intestate were, at the time of his death, and when your orator took out letters of administration as aforesaid, actually employed in cultivating the plantation on Fenwick's Island, devised to him by his father as aforesaid, your orator, in order to carry on the necessary business of the said estate, and to continue the cultivation and gathering in of the crop then on the ground, entered into possession of the said plantation, and still holds the same; and that he has also in his possession, as part of the estate of the said intestate, the stock of cattle, bequeathed to him by his father, as aforesaid.

"And your orator further shews, that since the death of the said intestate, various and conflicting claims, as to the said plantation and the said stock of cattle, are set up and advanced by and amongst his surviving brothers and sisters, and the said children of his deceased sisters, and others claiming through them. The said Wm. M. Murray claims and pretends that the said J. J. Murry having left no child or grand-child, living at his death, he, the said Wm. M., is entitled to the said plantation, on Fenwick's Island, under the limitations of the will of his father, above recited. On the other hand, the surviving sisters of the said intestate, and the children and other representatives of his deceased sisters, insist that the said Wm. M. Murray is not exclusively entitled to the said plantation, be-

cause it was devised by the said will to the said Wm. M. Murray, surviving the said J. J. Murray, in case the said J. J. Murray should die *under age* and leave no child or grand-child, living at his death; and though the said J. J. Murray may have left no child or grand-child, living at his death, yet he did not die under age. And the said surviving sisters of the said J. J. Murray further insist, that as the said plantation was devised to him for life only, and none of the contingencies, on which the reversion of the same was devised after his death, have happened, the said reversion is part of the rest and residue of the said testator's estate, and that all his surviving children, and the children of his deceased children, are entitled to the same, under the residuary clause of his said will. Again, the said John Hanahan, for himself and his said children, who are infants under the age of twenty-one years, and in right of his wife, the said Elizabeth Mary, and also in behalf of his said two children, James Joseph Clark and Elizabeth Jenkins Clark, who are all infants under the age of twenty-one years, insist that the reversion of the said plantation does not pass under the residuary clause of the said will, but that the said testator died intestate as to the said reversion, and that the same vested, in all his children surviving him, a fee simple; and that at the death of the said Martha Murray, who intermarried with the said John Hanahan, and died intestate, as aforesaid, he, the said John Hanahan, and her said children, became entitled to her share of the said reversion; and at the death of the said Abigail J., who intermarried with Wm. M. Clark and died intestate, as aforesaid, the said Wm. M. Clark became entitled to one-third part of her share of the said reversion, which, at his death, passed, under the residuary clause of his will, to his widow, the said Elizabeth Mary, now the wife of the said John Hanahan, and his children, the said James Joseph Clark, and Elizabeth Jenkins Clark; and that the said John Seabrook, in like manner, claims that he is en-

titled to a share of the said plantation, as one of the heirs at law of his said deceased wife Margaret. And as to the said stock of cattle, the said Wm. M. Murray claims that he is entitled to the same, under the bequest thereof of his father's will, in case either of his sons should die and leave no child or grand child, living at his death, to his surviving son; but the said surviving sisters and children of the deceased sisters of your orator's said intestate, insist that the said Wm. M. Murray is not entitled to the said cattle, under the will of his father, and contend that it is the true intent and meaning of the said will, that the said Wm. M. Murray, surviving the said J. J. Murray, should take the same only in case the said J. J. Murray should die during the life and widowhood of the testator's wife, and leave no child or grand-child, living at his death; and the testator's wife having died before the death of the said J. J. Murray, and even before the death of the said testator himself, the said cattle belonged absolutely to the said J. J. Murray, not subject to any contingency, and is distributable with the rest of his estate, among his surviving brothers and sisters, and the children of his deceased sisters."

The following decree was made by his Hon. Ch. HARPER:

The copy of the bill furnished me, as a brief in this case, contains a full and accurate statement of all the facts, the several claims, and the points of law, which are made. All the statements are admitted by the answers. I therefore adopt it for the purposes of this decree.

The only question necessary to be considered is, whether, by the testator's devise of his plantation to his two sons for life, with further limitations, cross remainders are created between them. If the devise had been to the two sons for life, with remainder to their issue, and if both should die without having issue, then over, there is no doubt but that this would

constitute the very case in which cross remainders are created by necessary implication, as I have said in the case of *Baldrich vs. White*, (2 Bail. 445.) "If property were given to two for life, and at their deaths to their children, and if *both* should die without leaving children, then over, here would be cross remainders by necessary implication, nothing being given to the remainder over, until the death of both without children. So it might be, if the word "*both*" were omitted, on the apparent intention to give over the whole property together, as one estate, which could not be effected till both were dead without children, and not to limit over their respective shares."

There is no doubt but that the testator's limitation over, in the event that his *surviving* son shall die without issue, is equivalent to a limitation in the event that *both* shall die without issue. It means of course, the surviving son who shall have taken the entire estate, by the previous limitation. It is not to be supposed that, if one son had died, leaving issue, and the survivor had then died, leaving no issue, the estate of the issue by the deceased son was to be divested and to go over.

In the elder cases, which are generally collected by Sergeant Williams, in his note to 1 Saund. 185, A. N. 6; it is said that the leaning of the court is against the raising of cross remainders:—that they will not be implied if, in the case of estates tail, the limitation is to the issue of the devisees *respectively*, and for want of *such* issue over, and that there shall be no such implication between more than two. But the more modern decisions, which may be regarded as the settled law, are that the court leans in favor of cross remainders, in order to effectuate the intention. The case of *Wright vs. Holford*, (Cowp. 31.) *Phifard vs. Mansfield*, (Cowp. 497.) *Watson vs. Faxon*, (2 Est. 36,) *Atherton vs. Pye*, (3 T. B. 710,) *Doe ex dem. Gorges vs. Webb*, (1 Taunt 234,) and *Lindsay vs. Harding*, (1 Russ. & Mylne, 636,) may be regarded as in point to the case of such a devise as I

have supposed. In *Watson vs. Faxon*, and the subsequent cases, it is settled that cross remainders will be implied between more than two, and although, in the case of estates tail, the limitation be to the issue of the devisees *respectively*, upon the apparent intention to give over the whole as one estate, which cannot be till all the tenants are dead without issue. In *Gorges vs. Webb*, it is said by Mansfield, Ch. J. "It has been truly said, that the ancient doctrine on this subject has been broken in upon, but it is wonderful how it ever became established. The method to bring the estate together, is to imply cross remainders." But with respect to the general doctrine, I am not aware that there is any doubt:

The circumstance which is supposed to take this out of the general doctrine, is that there is an express limitation to the survivor, if either of the sons shall die under age and without issue, which excludes the implication of such a limitation, if he shall come of age and then die leaving no issue. But is the implication less necessary in this case, than if there had been no limitation at all as between the sons? The reason of the case to which I have referred, applies with as much force, in every respect, to this. The whole is given over as one estate, and nothing is given over till both shall be dead, having left no issue. It is given over, too, to those who were the testator's heirs at law, and comes up altogether to the case of the devise to the testator's heir at law, after the death of his wife. Suppose the parties now claiming to take the moiety of the estate in fee; the children of the deceased married daughters may die, and transmit their interests to those who are strangers to the testator's blood, and if it should hereafter happen that the surviving brother shall die, leaving no issue, are these interests to be divested and go according to the disposition of the Will?

I do not, however, think it necessary to resort to implication at all, but that by a very fair construction, express, cross

remainders are limited, at whatever time of life the sons may die without issue. There can be no doubt here about the actual intention, and when that is clear, the court will often transpose or alter words in order to give it effect. For example, when there is a devise to one, and if he shall die under age *or* without issue; the court may change *or* into *and*, because it cannot be supposed the intention, that if the devisee should die under age leaving issue, the issue should be left unprovided for. As little can it be supposed the intention of this testator, that his estate should be distributed into fragments and parcels, before the period fixed for its ultimate distribution. Indeed, I suppose the draftsman of the will to have used the word *and* instead of *or*, from some apprehension of the effects of the latter word, if the devisee should die under age leaving issue. But there is the very same reason—of effecting the intention—in the present case, for changing *and* into *or*. The case of *Maberly vs. Strode*, (3 Ves. 450,) was one in which the testator devised to his son, for life, with remainder to his children, but if he should die under age, *and* unmarried, then to nephews and neices. The son married after his father's death, but afterwards died, never having had any issue. The Master of the Rolls said, that the common understanding of the word "unmarried," was never having been married, and that in order to effect the intention, "*and*" must be changed into "*or*," and he held the limitation over good. He said the word "*and*" is often construed "*or*."

But the case of *Brownsword vs. Edwards*, (2 Ves. 243,) seems to me to come fully up to the present. In that case, the devise was to John Brownsword, and *the heirs of his body*, if he should attain twenty-one, or have issue. But if she should die under twenty-one, *and* without issue, then to his sister, with a limitation over to his own right of heirs, if she should die under age and without issue. John Brownsword attained twenty-one, and afterwards died without issue, having de-

vised his real and personal estate to his wife. Lord Hardwick said, "it would defeat the intention to restrict the contingency to his *dying without issue under age*." Then, as to the latter words: "If the court is compelled to make the construction the plaintiff insists on, the court will do it. But, however, in the construction of wills, the court has construed the words conformably to the intent of the testator as much as possible, ranging them in a different order, and transposing them, so as to comply therewith; there is no necessity to do either in this case, or to supply material words, but there is a plain natural construction upon the words, viz: *If the said John shall happen to die before twenty-one, and shall also happen to die without issue*." He makes it an executory devise, if he should die under twenty-one, and a remainder expectant in his estate tail, if he should afterwards die without issue. He says this construction could not be made if the devise were to him *and his heirs*, for in that case, the fee could not be cut down to an estate tail, by such contingent limitation. "An estate tail is capable of a remainder, and it is natural to expect one after it. It is contrary to his intent to let in the remainder to the right heirs, to defeat all the intermediate limitations to his family. This is the intent of the testator, and well warranted by the words of the will." So I should say in the present case. I have no doubt but that, in truth and in fact, by the words of the devise, the testator did mean, "If either shall happen to die under twenty-one, and also, if either shall happen to die without issue"—at whatever time of life, it shall go to the survivor. An estate for life is capable of a remainder, and it is natural to expect one after it. It is contrary to his intent, that this property should pass under the residuary clause of his will, or be distributed among his next of kin, under the statute, (which are the claims that are set up) to defeat all the intermediate limitations to his fa-

mily. This is the intent of the testator, and well warranted by an easy construction of the words of the will.

With respect to the cattle, as to which some question was made, there is no doubt but that there are express cross limitations.

It is ordered, adjudged and decreed, that upon the death of the intestate, James Joseph Murray, without issue, the land devised to him by the will of his father, the testator, Joseph James Murray, (and also the stock of cattle bequeathed to him by the said will,) by the limitations of the said will, vested in the defendant, Wm. M. Murray. Complainant's costs to be paid out of the estate. Defendants to pay their own costs.

And from this decree, the defendants, with the exception of Wm. M. Murray, appealed, on the grounds :

That as the said James Joseph Murray did not die under age, and leaving no child or grand-child living at his death, but on the contrary, lived to attain the full age of twenty-one years, the contingency on which the estate devised to him was limited over, has not happened, and the whole vested absolutely in him, and is now distributable as his intestate estate.

Or should the court be of opinion, that the said estate was devised to the said intestate for life only, then these defendants submit, as is set forth in the bill of complaint, that none of the contingencies, on which the estate was devised over after his death, having happened,—the reversion of the said estate is part of the rest and residue of the testator's estate, and is distributable according to the residuary clause of his will.

Or should the court be of opinion, that the said estate did not vest absolutely in the said James Joseph Murray, and that, after his death, it does not pass under the residuary clause of testator's will, then these defendants submit, that the

said testator died intestate of the reversion of the said estate, which reversion, on his death, vested in his heirs at law, and is distributable among them or their representatives.

That the moiety of the cattle bequeathed, by the will of the testator, to the intestate, at his mother's death, then vested absolutely in him, and is now distributable as a part of his estate.

Curia, per JOHNSON, Ch. The Court concur in the judgment of the Circuit Court. The appeal is dismissed.

JOHNSTON, HARPER and DUNKIN, Ch., concurred.

King, for the motion. *Perroneau, Mazyck and Finley*, contra.

Tristram Bethia and others vs. John McKay, Archibald McKay and others.

After an order to account and report made, a Complainant shall not, on payment of costs, have leave to dismiss his bill.

Heard at Marion, January, 1839, before JOHNSTON, Ch., and carried up upon the following report by his Honor:

The bill was filed, in this case, by the plaintiffs, who were distributees of the estate of Donald McKay and Flora McKay, against the defendants, part of whom were co-distributees, and others administrators of the said estate, for partition and account.

Among other things, the bill charged that certain negroes in the possession of some of the defendants belonged to the estate of Donald McKay, one of the intestates, on the other hand they were claimed, by those in possession; under a parol gift made by the intestate. On the trial, the defence was made good, and, of course, that part of the bill was dismissed. A decree passed, however, that the administrators of the respective executors should account for their administration. The account was taken, and it appeared that, out of the share of the estate of Donald McKay, to which the plaintiffs are entitled, (which was \$378,) there was still due a balance of \$127. It was stated, without contradiction, that, before suit and afterwards, the administrator had offered to turn over notes to the amount, or to give his own, but the plaintiffs refused to receive them, preferring that the administrator should collect the notes himself and pay over the avails. By the account it further appeared that, on the estate of Flora McKay there was a balance due by the plaintiffs, to the administrators of between 2 and 300 dollars. It was stated, without denial, (and an inspection of the report on the accounts confirmed the statement,) that this balance accrued more than four years before the the present time, but was not barred when the bill was filed.

There was no exception to the report; but when the defendants moved to confirm it, the plaintiffs moved, on payment of costs, for leave to dismiss so much of their bill as claimed an account from the administrator of Flora McKay. The court refused the motion, and, on motion of defendants, counsel, confirmed the report.

The Complainants appealed, on the ground, that they had a right, on payment of costs, to dismiss their bill.

Curia, per HARPER, Ch. The only case relied on, which seems to sustain the appeal, is that of *Lester vs. Bossard*, (2 McC. Ch. 419,) in which it was determined that, after an order to account and report made, the complainant might, at pleasure, dismiss his bill, upon payment of costs. But we are compelled to conclude that the determination in that case is opposed to the current of authorities, as well as to justice and convenience. In *Meddron & Bruce vs. DuBose*, (2 Hill Ch. 375,) the authority of *Lester vs. Bossard* was, in some degree, shaken, and it was supposed to depend on its peculiar circumstances. The case of *Lashley vs. Hogg*, (11 Ves. 602,) was referred to, in which, after a decree to account, with the usual advertisement for creditors, Lord Eldon refused leave to dismiss the bill upon payment of costs, even with consent of parties. The creditors being made parties, by being called before the court, had an interest in the decree, of which the original parties could not deprive them. In *Gilbert vs. Faules*, (2 Freem. 158,) at the hearing of the cause, it was decreed to account, and the account was stated by the master. The plaintiff moved to dismiss his bill upon payment of costs, and it was urged that *quilibet potest renunciare juri pro se introducto*. The Master of the Rolls directed the matter to be moved before the Lord Chancellor, by whom the motion was denied; "and the Lord Chancellor and Judge Brown, in 17 Car. 2, between *Cheatly & Packington*, gave the same rule in the like case."

The case of *Carrington vs. Holly*, (Dick. 280,) seems to have a bearing on the principle. Upon the hearing, an issue was directed, and the plaintiff moved to dismiss the bill, upon payment of costs. This motion was granted; Lord Hardwick saying that the plaintiff might dismiss his bill at any time, though it would have been otherwise if there had been a decree. "So, likewise," said his lordship, "if the issue had been tried and a verdict in favor of the defendant;

though defendant might have set the cause down on the equity reserved, in order to have the bill dismissed upon the solemn judgment of the court, so as to make the order of dismissal pleadable." This last dictum is said by Maddock, in his *Treatise of Equity*, 2 vol. p. 390, not to be warranted by the Register's book; but, in *Gartside vs. Irherwood*, (Dick. 612,) Lord Hardwicke is made to refer to the case of *Carrington vs. Holly*, and to repeat his former opinion. An issue is to satisfy the conscience of the court, and the verdict is certainly no decree; yet it is a determination of the rights of the parties, on the benefit of which the defendant has a right to insist.

But, in *Rossard & Lester*, the rule is stated to be, that the plaintiff is entitled to dismiss his bill at any time before a decree fixing the rights of the parties. It is evidently assumed that the decree to account, or order of reference, is not such a decree. This is plainly a mere misapprehension. That it is not such a *final* decree as to entitle it to the lien or priority of a judgment at law, is very well settled. Such was the determination (in *Morris vs. The Bank of England*, Ca. temp. Talb. 217,) that a mere decree for an account of the demand of the plaintiff and of the personal estate come into the hands of the defendant, with direction for the payment of the result of that account, is not a decree to prevent an executor confessing or paying a judgment. In *Perry vs. Phillips*, (10 Ves. 34,) by the decree, accounts were directed, and it was ordered that what should be found due should be answered by the defendant. It was contended that this last order made it a final decree; but it was held to be only the ordinary decree *quod computet*, and not *final* to prevent the executors confessing or paying. As to the decree *quod computet*, see the numerous cases referred to, 2 Chit. Eq. dig. Tit. *practice*, xxxiv, 4.

When there is a decree to account, each party becomes an actor, entitled to prosecute his suit to effect and to recover

what shall be found. As is said in *Stowell vs. Cole*, (2 Vern. 297,) where there is a bill for a mutual account, the plaintiff must pay the balance, if found against him. In *Smith vs. Eyer*, (2 Atk. 385,) Lord Hardwicke says that the decree *quod computet* always concludes in the same manner, and is not varied. Though the words are inserted, *that each party do pay*; when the order is made absolute the money is to be paid to the person reported to be entitled. Such is our own daily and familiar practice.

If the right to an account should be denied, and that question be heard and solemnly determined, and an account be directed in consequence, could it be said that this was not a decree fixing the rights of the parties? Can it be less so because the account was directed upon the defendant's own submission? It is probable that, according to the English practice, the decree, *quod computet*, is entered in a more formal manner than with us. I gather from Smith, Eq. Pr., 2 vol. 96, that, after the decree to account entered, an order is made to refer to a particular master. But the order to account, or order of reference is, in substance and effect, this decree. A question might, perhaps, be made, when, by the order, the equities are reserved, and the right to an account may be contested even after the coming in of the report. But such is not the present case or that of *Lester vs. Bossard*.

Reluctant as we are to depart from a decision once made, and high as is the authority of the eminent Judge who delivered the opinion in the case of *Lester vs. Bossard*, yet we must call to mind that the court, at that time, was new to the Equity practice, and decided from analogy to the practice of Law. Though injustice may be done at law, by permitting a plaintiff to submit to a nonsuit after notice of discount filed, yet the rule had existed immemorially, and courts would not innovate upon it, in order to remedy the evil, when the law of set off was introduced. But, certainly, this affords no reason

why we should innovate upon the established practice of Equity, in order to produce a similar injustice. This is not one of the decisions on the faith of which rights may have been vested, or acquiesced in, which might be shaken by its reversal; but, certainly, it would continue to work injustice, that, after a defendant has been put to establish his demand, at great expense of time and labor, and of money too, which costs will not reimburse, he should be disappointed of the fruit of his exertions at the arbitrary will of another. In the case before us, if the defendant were now put to bring a separate suit, a question might be made, whether he could be barred by the Statute of Limitations.

The decision of the Chancellor is affirmed.

JOHNSTON, DUNKIN, and JOHNSON, Ch., concurred.

Graham, for the motion.

*Life and Catharine S. Barclay vs. Elias O.
Executors of Hugh Swinton Ball, and*

CHARLESTON, FEBRUARY, 1840.
In *Stowell vs. Cole*, (2 Ver.
nal account, the plaintiff
In *Smith vs. Eyer*,
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my;

a steamboat, at sea, by the explosion of
and caused it to fall to pieces and sink
at Mrs. B. was seen, and was heard to
ly after the disaster, and that he was not
seen at any time after the explosion; Held,
husband.

ons as age, health, &c., may be resorted to, to aid
e there is any evidence whatever, even though it be but a
ern in the decision of the fact."

ere the benefits of survivorship were not mutual, the burthen of
on the side of the party to whom the survivorship would have been

al.

here one bequeathed to his wife all the property real and personal which he
nad received by his marriage, and also devised to her, specially, a certain tene-
ment and lands, on which a portion of the money received by marriage had been
expended; it seems that the wife would be entitled to both without any deduc-
tion.

Heard before his Honor Ch. JOHNSTON, at Charleston,
January, 1839.

Hugh Swinton Ball, with his wife and his adopted daugh-
ter, Emma, embarked at Charleston, on board the Steamer
Pulaski, on the 14th June 1838. The vessel was destroyed,
on that night, by the explosion of one of her boilers, and the
greater part of the passengers perished; among them, Mr. and
Mrs. Ball.

Mr. Ball had left a will, and, in the disposition of his estate
according to its provisions, it became a question whether Mrs.
Ball had survived her husband.

The voluminous evidence to this point is so accurately and
luminously digested by the Hon. Chancellor who delivered the
following decree, upon the circuit, that a further detail of it
would be only a needless repetition.

The admirable preparation and argument of this cause have enabled the Court to form a judgment, satisfactory to itself, at an early day; which, at the earnest solicitation of the parties, it hastens to announce; although, for itself, in a matter so important, it would have desired further time, and better opportunities than the hurry of term time admits of, for assigning the reasons of its decision.

The case belongs to a highly interesting head of law, upon which there is, as yet, very little of positive decision; particularly in the common law courts. I refer to cases where some right is made to depend upon the question, which was the survivor of two or more persons, who have perished by the same calamity.

Much, I may say, every thing, depends, in my conception, upon two considerations: First, is it open to observation and evidence; or is it withdrawn from all scrutiny, and consigned to conjecture? Second, the nature of the right dependant upon the survivorship: is it mutual, or is it of such a nature that if one of the parties happens to be the survivor, he derives nothing from the other, but simply retains what belonged to him; whereas, if the other had been the survivor, he would have had an accession from the deceased?

Where the nature of the calamity is entirely unknown, it would seem, at first view, that there are no rules of reason, or of law, by which the case can be decided; and yet, as there are cases of this description, in which there must be a decision: in which a refusal to decide, would be a decision; so there are rules, applicable to some of them, very well known, particularly to the common law, by which a decision, entirely consistent with reason, can be made. I allude to the rule which must, without contest, be applied to a case where the persons, upon whom the right depends, may have gone abroad, and have not been heard of for such a length of time, as to raise the presumption of their death. The circumstances un-

der which they perished are wholly unknown, but the rule is well settled, that the last seen or heard of shall be adjudged the survivor.

Yet there may be cases of absentees, in which the rule mentioned cannot be applied: as where both parties emigrated together, were last seen together, or were last heard from at the same time. This would reduce them within what, in the argument, has been called the conjectural class. There are other conceivable cases: not only conceivable, but which, indeed, not unfrequently occur, where, although the nature of the calamity is inferred with a high degree of probability, yet the priority of death, among the victims, is conjectural: as where they have sailed in the same vessel, which is known to have been lost, leaving no surviving witnesses, or has never been heard of. There are other cases, still, where the nature of the calamity is well known, where, indeed, the catastrophe has happened within the view of many witnesses—where the survivorship must be left to conjecture; as where the victims were inclosed within a house, and perished by a sudden explosion.

Now, it is admitted, that within this category, the English and American courts have hitherto carefully avoided the adoption of any rule of decision. The cases have gone off on compromise, or were decided upon a rule adapted to the nature of the question before the court, and not to the question of right, as transmitted by survivorship. Thus, *Rex vs. Dr. Hay*, (1 W. Black. Rep. 640,) where General Stanwix, with his wife and a daughter, by a former marriage, sailed from Dublin to England, in the same vessel, which was never afterwards heard of, the question was, who was entitled to the administration of the General's estate—his next of kin, or the maternal uncle of the daughter who had perished? For the maternal uncle, it was contended, that, in analogy to the civil law, it should be presumed that the daughter survived the fa-

ther. But the court held that the question before it, concerned the right of administration only, and not the right of distribution, and decreed in favor of the next of kin of the father. So, in *Taylor vs. Diplock*, (2 Philim: 361—1st Eccles: Rep. 250,) where a husband appointed his wife executrix, and residuary legatee, and both were subsequently shipwrecked together, and drowned, and the contest was for the administration, between the next of kin of the husband, and the next of kin of the wife. The evidence left it doubtful which of the parties survived, upon which the Judge granted administration to the next of kin of the husband; remarking: "I am not deciding that the husband survived the wife." There are some observations, in the opinion of the Court, which do bear upon the question of survivorship, and intimate that, as the wife's kindred claimed the administration on the score of her survivorship, they were bound to prove it. But the closing remark of the Judge shews, I think, that in questions of administration, the Court does not feel itself called upon to undertake a very exact decision of the fact of survivorship; the right of distribution being always left open. So, also, in *Wright vs. Samuda*, (2 Phillim. 266, [note] S. C. 1 Eccles. Rep., 253,) reported also under the style *Wright vs. Netherwood*, (2 Salk. 593,) [note] where the subject of survivorship was somewhat considered, the judgment was given on the real question before the court, which was, whether a will, made by Netherwood, was, under the circumstances, revoked by his subsequent marriage, and the birth of issue. In the case of *Selwyn*, (3 Hag. 748; 5 Eccles. Rep. 254,) where the court treats somewhat of the same subject of survivorship, in conjectural cases, the question was, as to the right of administration: and it was granted to the applicants without objection.

I think I may safely conclude, that (as observed by Chancellor Kent, 2 Com. 350, part 5, Lect. 37,) "the English law has hitherto waived the question." I am not, however, pre-

pared to abandon, as delusive, all efforts to attain rules capable of deciding the fact of survivorship, even in cases denominated conjectural. I have said, that there are cases where, owing to the quality of the right, depending on the survivorship, the exigencies of society demand a decision, and will take no denial. Where the right is not mutual, it may be safest, and perhaps, in such instances, the rule should be, as stated in some of the cases to which I have referred, to abstain from any thing approaching to conjecture, and leave the right untouched, unless it can be shewn, by reasonable evidence, that the party who is to take derivately, was the survivor. But there are instances, such as cross remainders, and partnerships, and such as would have arisen on joint tenancies before the abolition of the *jus accrescendi*, (as in *Rroughton vs. Randal*, Cro. Eliz. 502,) where there must be a decision, and to which the rule just mentioned cannot be applied, without in fact deciding for one of the parties, and against the other, by refusing to decide at all; and where indeed that may not be the only consequence. I should, therefore, be loth to admit, that our law is not capable of reaching and deciding these the cases, and all others, which the peace and order of society required to be determined. And, indeed, there will generally be found something in the condition of the parties, their age, strength, health, and habits, which will, in some degree at least, rescue the decision from the imputation of rash conjecture, and place it rather upon the foundation of evidence and probability, than tremulous presumption.

But where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact. There is nothing which more distinguishes the common law, than the preference which it constantly gives to evidence, over all artificial presumptions, unless it be those which are essential to the judicial institution itself, and to the preservation of social order. The common law encourages a resort

to every fountain from which truth can be drawn; it listens to witnesses; it looks into the internal evidence of things; it contemplates the whole of the circumstances, and then draws its conclusions, according to the preponderating probability.

This is the rule of reason, which has a place, and is of the essence of every code, in every country. Thus in the Code Civil, (liv. 3. tit. 2, no. 720,) it is provided that if several persons entitled to inherit from each other, happen to perish in the same event, (to which the Louisiana code adds, by way of illustration, "such as shipwreck, or battle, or conflagration," p. 298, chap. 4, art. 930) without the possibility of knowing which died first, (here is the primary proof) the presumption of survivorship is determined by the circumstances of the fact; (here is the secondary proof,) and in default of these (the internal circumstance or circumstances of the fact,) lastly, by rules enacted in the code, as applicable to cases of a mere conjectural character.

If the case is divested of proof and the exigency demands it, resort should be had to extraneous circumstances. If it contains internal evidence and no more, that must be resorted to. But if, to this, witnesses can be added, bearing positive testimony, or detailing facts from which reasonable inferences can be drawn, these furnish the most satisfactory proof.

In what I have said hitherto, I have contemplated a case, where the cause of death consisted of one disaster, whether of more rapid or of slower operation. But where the danger consisted of a series of successive operations, separated from each other, and each capable of inflicting death upon the victims according to the degree of the exposure to it, there is certainly more scope for testimony, and for inference, from circumstances, than in other cases.

Let us now turn to the case of Mr. and Mrs. Ball, and see, if, from the mournful circumstances of their fate, we can ex-

tract any thing to solve the important question, to which it has given rise.

The Pulaski, according to the testimony, left Savannah on Wednesday the 13th of June 1838, with many passengers, and arrived at Charleston that evening. The next morning, Mr. and Mrs. Ball, their adopted daughter, Emma, and servant; having gone on board at Charleston, she departed for the north, and pursued her course, until about 11 o'clock of that night, when, most of the passengers having retired to their berths, the starboard boiler exploded. By the explosion, an extensive breach was made on the starboard side of the vessel. Her main deck was blown off, particularly on the starboard side, thus destroying the communication between the forward and after part of the steamer. The forward part of the upper deck, (called the hurricane deck, in contradistinction to the after part, which is called the promenade deck,) was blown off, carrying with it the wheel house, in which the commander of the boat, Capt. Dubois, was sleeping at the time. The gentlemen's forward cabin was much torn; its floor ripped up, and its bulk head driven in; and Major Twiggs, whose berth was there, gives us reason to suppose, that many perished, in that part of the vessel, by the explosion. The gentlemen's after cabin (which was under the main deck, and immediately beneath the ladies' cabin, which was on that deck) was also injured. Some part of the floor was ripped up, the bulk head partly driven in, and the stairs communicating with the deck, more or less shattered. The vessel was careened to the larboard, and as she dipped, began to fill with water. In a very short time the hold was filled, and the water gained to the level of the floors of the gentlemen's cabins. It rose higher with great rapidity, the vessel settled to the centre, where the breach was; and all hope that she could hold together was abandoned. She parted amidships, and the forward and after parts pitched into the water, towards the centre, at an angle

of nearly thirty degrees. The gentlemen's after cabin was now entirely filled, and the forward cabin was certainly in as bad a condition. There were some persons on the forward part of the vessel, nearly all of whom speedily perished; but the greater portion were in the after part, including one or two who had passed, by swimming from the forward to the after part. Of those on the after part, as many as could climbed to the promenade deck, but there were many, mostly ladies, among whom was Mrs. Ball, who remained on the main deck. These, as that deck sank deeper and deeper, retreated along the gang-ways, by the ladies' cabin, towards the stern. The promenade deck, by the action of the waves, was burst from the top of the boat, and was submerged with all that were on it. Whether the stern of the boat was submerged at, or after this time, is uncertain. Some of the witnesses think it was submerged even before the promenade deck, others that it was not submerged at all. All these events had taken place, according to most of the witnesses, in about from forty to fifty minutes; according to others, in less time.

Some few escaped in the boats, others on parts of the wreck, and others on rafts constructed by them as they could, amid the horrors of the impending destruction.

Of Mrs. Ball, nothing is known, after the submerging of the promenade deck, nor for some time before. Before that event, her cries were heard by one witness, who had gained the promenade deck, as they proceeded from the place she still occupied on the deck below. No witness speaks of her afterwards.

Within a few minutes after the explosion, according to one witness who knew her, she came out of the ladies' cabin, and began to call upon her husband. The scene was one of terror, as may be supposed, but although a crowd was instantly gathered at that part of the vessel, there was not much noise.

The surrounding horrors seem to have subdued the sufferers, and in mute astonishment they contemplated the fate which awaited them. Even the wheels had stopped. Nothing but the sound of the waters, which were somewhat disturbed, and the hasty exclamations of friends, as they sought each other out, and the noise occasioned by such preparations as the more active and prudent felt themselves called upon to make, for themselves and others under their charge, were heard. But the voice of Mrs. Ball was heard above all others, calling upon her husband. She ran forward to the chasm caused by the explosion; retraced her steps, and continued to traverse the starboard gangway in search of him, uttering his name in tones so elevated by her agony, that they reached most parts of the vessel, and seem to have made an indelible impression upon all who heard them. Her cry, according to one witness, was a cry of bitter despair and anxious enquiry; and, according to all, it was lifted in shrill tones, carrying an irresistible appeal to all hearts.

Mr. Ball was neither seen nor heard. Mrs. Ball was heard and seen by many, but no response was heard to her cries, nor was any one seen to approach her, for her protection or consolation. Two witnesses, who knew Mrs. Ball, saw *her*, but did not see *him*. One of them passed and repassed her, in a hurried manner to be sure, but did not discover him.

He was neither seen nor heard after the explosion, unless he was the person referred to by two witnesses, who state the following circumstance. Very shortly after the explosion, a boat was let down on the starboard side of the steamer, into which some persons descended. As the boat was lying below, a gentleman came to that side of the deck, and throwing a coat into the boat called to those in it to hold fast a moment, and instantly disappeared. He never re-appeared, but, the next day, the coat was found to be a black dress coat of a large size, (such was the size of Mr. Ball,) and in one of the

pockets was discovered a shirt collar, on which was written the name of Ball, with some initials, which the witnesses have forgotten.

Now, these are the circumstances of the case. It is not a case of an unknown calamity, nor of one withdrawn from observation; nor is it a case where the calamity was of instantaneous operation. It is a case for testimony, and to be decided on testimony.

I incline too, to the opinion, that as the right, on the part of Mrs. Ball, was derivative, and without mutuality, the burden is upon the plaintiffs, who claim through her, to prove that her right vested—that she was the survivor. Without considering it necessary to decide that this is the proper rule here, I shall undertake to be governed by it. No conjectural inference, no inference except from evidence, will be drawn on behalf of the plaintiffs. They must make out their case, or the rights of Mr. Ball will be permitted to remain as they were. But because the plaintiffs are to prove the fact of survivorship, it does not follow that they are to prove it to demonstration. All reasonable inferences will be drawn from the best evidence, suggested by the case; and although at last we may be far from arriving at any thing like certainty, although, indeed, there may remain much obscurity and doubt, yet if we have evidence only sufficient, to lead us out of the regions of conjecture, we must follow it.

I shall not, (because it is unnecessary) resort to the bare fact, that Mrs. Ball was the last person seen, or determine whether that fact, alone, is not sufficient to raise a presumption, in analogy to the doctrine which prevails in cases of absence. I incline, however, very strongly to the opinion, that where the evidence has traced the parties into a common danger, which proved fatal to both, the last one seen or heard within the operation of the cause of death, must be adjudged the survivor, unless there be something, in the nature of the

circumstances, to rebut the presumption, or render it inapplicable. The analogy to cases of absence is very strong. The proof, here, that the death has occurred, stands in the place of lapse of time; which is employed only as proof that the parties *have died*. When they died, relatively, may be judged of, in this case, as in that, by considering which was last known to be alive.

I prefer, however, to put the case upon the ground of probability, arising from the evidence; upon a belief engendered by a combination of the circumstances; and upon the superiority of positive proof over conjecture or even probability.

It will be remembered, that the explosion produced its most fatal effects in the gentlemen's forward cabin, and that was the first part of the vessel which submerged. That the after cabin was also much injured. That from the forward cabin many persons never escaped. From the after cabin, so far as we know from the evidence, all did escape except Judge Cameron, an infirm old man. But, from the description given of its condition, it is possible that some others may have been detained, either from being hurt, or otherwise, until the cabin filled.

It is *certain* that Mrs. Ball escaped the explosion. Is it certain that Mr. Ball did?

Mr. Ball engaged a berth in the after cabin. The probability is that he got it, but this is far from certain. The boat came with many passengers from Savannah; which may have occasioned Mr. Ball to be displaced and transferred forward. I think, however, it is not probable he was so transferred, because, by an arrangement between the agents in Savannah and at Charleston, they were entitled to let the berths in alternate order, throughout the boat; and we know that some of the passengers, who came from Savannah, had not the advantage of pre-occupying the after cabin, and that some of the Charleston passengers were let into the cabin; Mr. Ball, therefore,

was probably in that cabin. But there is a probability that he was in the forward cabin, and if so, in the greatest danger, from the explosion. Mrs Ball was clear from that danger *certainly*, Mr. Ball only *probably*. Here was one chance for *his* destruction, from which *she* was exempt.

Supposing that Mr. Ball was in the after cabin. The *probability* is that he was not killed by the explosion. The *certainly* is that Mrs. Ball was not. But the condition of that cabin, as described by some of the witnesses, coupled with the fact, that at least one man was not able to escape from it, before it filled, renders the destruction of Mr. Ball in that place, by no means a visionary supposition.

Here was another chance for Mr. Ball's destruction, from which his wife was *certainly* free.

On the deck. We *know* that Mrs. Ball was there, as yet uninjured by the explosion, the filling of the cabins, and all preceding dangers, from which many had already perished. *This is certain*. Is it certain that Mr. Ball had hitherto escaped, and was the person who threw the coat into the boat? It may be that he was the man. I think it hardly probable. I should have thought that he was the man, if he had been seen at any time near his wife, or had answered to her heart rending calls. But it is more probable, that some one else, in the hurry of the moment, may have mistaken Mr. Ball's coat for his own, and thrown it into the boat, than that an affectionate husband and brave man, as Mr. Ball is proved to have been, should have heard such appeals as were made to him, by his wife, and should, at such a time as that, have failed in his duty to her.

We are *sure* that *she* was there. I think it was *not probable* that *he* was.

We have indubitable evidence that *she* had so far escaped: the same evidence, with a moral force which cannot be resist-

ed, convinces us that he must have already perished, or he would have been at her side.

Here are circumstances, some of which, until our nature shall be utterly changed, cannot well deceive. Here is a combination of circumstances, all tending to the same conclusion: and although some of them, by themselves, are not very forcible, yet, when it is seen that they all harmonize, the effect must be to beget belief.

I have, from all these considerations, formed the opinion, that Mrs. Ball survived her husband.

It remains to consider the effect of this fact upon the distribution of the property, under the will, and by operation of law.

The legacies must be disposed of, as provided for in the contingency, which has happened, of the testator's death without leaving issue. Such as have lapsed must be distributed, (for want of a residuary clause in the will) as intestate property between Mr. Ball's wife, and mother, according to the construction put upon the acts of 1791 and 1797, in the case of *Trapp vs. Billings*, (2 M'C. Ch. R. 403.)

The legacy to the adopted daughter, Emma, clearly lapsed; and is so distributable.

The interest in the crops, as defined in the will, given to Alwyn Ball, in conjunction with Elias O. Ball, does not lapse by the pre-decease of Alwyn, but vested, (according to the case of *Percival vs. Thomas*, recently decided, *Supra*, p. 21,) in Elias O. Ball, as survivor.

A question has been raised, though not argued, whether the half of the crops, as defined in the will, given to the wife, and in the event which has happened, of her dying before Nonus' majority, limited over to the brothers of the testator, until another event in the will described, is to be considered lapsed and intestate, after that time. The impression of the Court is, that it does not lapse, but that there is evidence of a strong in-

tention on the face of the will, that this half should follow the disposition made of the other half.

Another question was suggested : whether, if it should turn out that the testator devoted any portion of the money acquired by him, in consequence of his marriage, in the purchase and improvement of other property, specifically bequeathed by him to his wife, (Mepshew and its pleasure grounds, for instance) the amount so expended, should not be deducted from the amount to which she would have been entitled as having come to Mr. Ball through her. As the point was not argued, I can only say, that I cannot call to my mind any authority or principle upon which Mrs. Ball would not be entitled to the whole.

It must be referred to the commissioner to take the accounts, and to report a proper mode of making a settlement upon Mrs. Taveau, of what she may recover in this case, according to the prayer preferred in her answer.

In closing this judgment, I cannot sufficiently testify my respect for the honorable disposition manifested by all parties. An appeal to the law was made, only because the minority of some of them rendered a compromise difficult, if not impossible. It is not a case for costs. Let the costs be paid out of the estate before distribution, and deducted, from the amounts coming to the parties, rateably.

The defendants appealed on the grounds,

That it was not sufficiently proved that Mrs. Ball survived her husband.

That the representatives of Mrs. Ball should have been put to their election, either to relinquish the devise of the Mepshew House [specifically bequeathed] and receive the amount expended, from her funds, thereon ; or, accepting the devise, to release their claim to the money expended.

That the bequest of the crops was not to Alwyn & Elias O. Ball, jointly; but to each, severally; and therefore, Elias could not take by survivorship.

Curia, per JOHNSTON, Ch. The fact, that the counsel in the Circuit Court attended exclusively to the question of survivorship, which was the leading one in the case, must be my apology for two palpable errors into which I fell, in delivering my judgment. It certainly was a strange misconception to suppose, as I did, that the bequest of one half the crops was to Alwyn & Elias O. Ball, conjointly, whereas the will expressly directs that it "*be equally divided between my brothers, Alwyn & Elias Octavus, until my nephew, Elias Nonus, is of age;*" and then to him, &c.

The cases quoted, in *Percival vs. Thomas*, are an unbroken current of authority that the direction, to divide equally between the two brothers, created a several, and not joint interest in them. The consequence is that, upon the death of Alwyn, in the life time of the testator, his interest in this legacy lapsed, and for want of a residuary clause, became devisable between the testator's wife and mother.

The other error relates to the half of the crops given to Mrs. Ball. This half is given to her during her life, and if she should die during the minority of Elias Nonus, then the income, from the time of her decease until Nonus shall attain majority, is to be divided between Alwyn and Elias Octavus. But there is no bequest of this part of the crops beyond the time of Nonus' majority, either to Nonus, himself, or to any other person. Mrs. Ball died during the minority of Nonus, by which event one moiety of this half of the crops vested in Elias Octavus Ball until the majority of Nonus, at which time it becomes intestate and distributable between the representatives of Mrs. Ball and the mother of Mr. Ball. The other moiety, which would have gone to Alwyn, lapses *in presenti*,

in consequence of his death, and is distributable, as intestate, between the same persons.


To this extent the decree must be reformed. In other respects the Court is satisfied with its correctness and it must be affirmed.

Upon the leading question, of survivorship, the decree does not proceed on any principles of law, either new, or speculative. It assumes that the burden of proof is upon the plaintiffs and that they must produce convincing evidence. What more could the appellant desire? The more I have considered the testimony, the more am I satisfied with the conclusion adopted in the circuit decree. The form of a decree was proposed here for the purpose of carrying the circuit decree into effect. It should have been proposed to the Circuit Court, and has been mislaid.

But leave is given to apply to the Circuit Court for any decree, or direction necessary to carry its decision, as now modified, into effect.

HARPER and DUNKIN, Ch., concurred.

JOHNSTON, Ch., was unavoidably absent at the argument of the counsel for the appeal, in reply, and therefore declined giving any opinion.

 The *will* of Mrs Ball, might have been desirable for the elucidation of some of the minor points made; but there is no copy or abstract of it in the record of the Appeal court.

The following argument of Col. HUNT, for the appellants, on the main point in this issue, will put the reader in possession of those features, as well of fact as of reasoning, upon which the appellants relied, more satisfactorily than any attempt of the reporter to digest impartially the encumbered mass of testimony.

Statement of the leading facts.

Mr. and Mrs. Ball were passengers in the *Pulaski*, on the night of her destruction. At supper, both were seen; Mrs. Ball occupied the ladies' cabin. The berth of Mr. Ball was in the gentlemens' after cabin, immediately below the ladies' cabin. About 11 o'clock, at night, the explosion occurred. The force of the explosion was forward. It filled the forward cabin with steam, and killed and wounded several persons. It also broke the starboard side of the boat, and blew off the upper deck in the centre, leaving that part of it, over the ladies' cabin, entire. A rush of air was all that was felt, in the after part of the boat, which tore off a few boards from the stairs and a few boards of the cabin floor. But all agree that the occupants of the after cabin, except old Judge Cameron, in all probability, got on deck—no one was proved to have perished, there, merely from the explosion. In a space of time, estimated from twenty-five to forty-five minutes after the explosion, the boat filled in the centre, and, in the act of sinking, carried the fore and after parts under water, and then broke, letting the machinery sink; when the wooden part, that is, the decks, again rose out of water. A few among the passengers got on various fragments of the wreck, and of those, a portion were finally saved. No one of those saved saw Mr. Ball—so that when he perished is absolutely unknown. Mrs. Ball, during the interval between the explosion and the sinking of the decks, was on the main deck, near the door of the ladies' cabin, and was doubtless drowned when the vessel sunk, as she was too feeble and terror stricken to struggle successfully in the water. Now these facts present the following general positions:

1st. There were three apparent and sufficient causes of death, which overtook Mr. and Mrs. Ball and the rest of the passengers—to wit: the explosion of the boiler—the sinking of the decks, and finally the exhaustion and exposure of such

as escaped the first two, and perished on the rafts and fragments.

2d. There were two apparent and known means by which the lives of some of the passengers were prolonged, and a few finally saved—to wit; the boats, and the fragments of the wreck.

3d. The great mass of those who perished were drowned when the vessel sunk, inwards and down, until relieved of the weight of the machinery. The explosion destroyed another class—how numerous, is left to conjecture; but they were those who were on the hurricane deck, midships, or in the forward cabin—there, several are known to have been injured. *Not one has been known to have been injured in the after cabin.*

The number lost, of those who got on such floats as accident threw in their way, cannot be estimated; but, unhappily, it is too true that several met their death for want of prompt aid, and those who did escape owe their lives to being picked up by a vessel passing.

Now, the position of the complainant is, “that Mrs. Ball did not die until after her husband was dead,” and this they undertake to prove, so as to acquire an estate by establishing that fact—and as the establishment of their case requires that, they should prove when Mr. Ball died, in order to get at the conclusion that his wife survived him, let us consider the leading rules. It is for the actors to prove what they allege, by competent legal testimony. “The party who alleges the affirmative of any proposition shall prove it,”—Gilbert’s Law of Evidence, p. 148.

The fact that Mr. Ball was dead, at the time his wife was heard on the deck, must then be proved. The case of *Wilson vs. Hodges*, (2 East, 312,) establishes the position that when a person is proved to be alive, he will be presumed to be so until his death is proved—and absence for seven years is the least period known to the law, sufficient to lead to the

conclusion, that a person, not heard of, is dead—that being a life, in the estimation of law. It follows, from this brief outline, that the death of Mr. Ball must be proved, like any other fact, by competent evidence—this evidence must be either direct, or circumstantial. It is admitted there is no direct evidence. Resort must then be had to circumstantial evidence, as understood by the common law—and not to those artificial, and of course, arbitrary rules, which, in the absence of *all* proof, are resorted to by positive enactment. What, then, is sufficient circumstantial evidence, to prove the death of Mr. Ball, at a period, anterior to the one when his wife was heard to call on him? Certainly it must be such as leaves no other conclusion—if it merely prove he might have been dead, it fails to prove the fact, and only establishes the possibility. To amount to proof, “there must be a necessary and usual connection between the facts and circumstances, and the conclusion sought. Testing the evidence by these rules, let us examine the facts.

The only cause of death, to which Mr. Ball was exposed prior to the time his wife was known to have been drowned, was the explosion—and the whole evidence concurs that not one of the passengers, in the after cabin, was known to be killed by that, but that, from fifty to sixty actually assembled on the decks, after that event. There is, then, no proof that Mr. Ball was killed by the explosion. The inmates of his cabin are known, generally, to have escaped—not one is known to have perished—nay, not even to have been injured. Mr. Lamar, who occupied the captain’s office, opposite the door of the ladies’ cabin, was not even waked by it. Here, then, there is still, a total absence of any fact, even to excite a surmise that Mr. Ball was an exception to the general result. The next and only cause of death was the sinking of the whole mass. And to this, Mrs. Ball was certainly exposed, with no hope of escape. Admit that Mr. Ball was exposed to the same ca-

tastrophe, he could escape—he might have escaped. Another passenger, who had lashed his wife to a coop, did, after the vessel sank, rise near, a hatch, on which he reached the promenade deck, and was a witness in this case. So far, then, from it, being proved, that Mr. Ball was dead, before the decks sank, there is no cause of death to which he was exposed—and the great and fundamental error, in the reasoning on the other side, is the resort to negative testimony, which, proverbially, “proves nothing.” He was not seen—he was not heard—therefore, he was dead—although no cause of death is traced to him.

As relates to the merits.—The case made is this: By his will, H. S. Ball gave to his wife his household furniture, servants, &c. and in case he died without children, he gave her all the property received by him in marriage, and other legacies out of his own estate. The claimants allege, that Mrs. Ball survived her husband: that all the provisions made for her, vested, if but for the few awful moments which transpired after the explosion of the boilers of the Pulaski; and that, consequently, her legal representatives are entitled to the same. To place the equity, or justice of the case in a clear point of view, it is only necessary to say, that Mr. Ball never contemplated a legacy, or provision for such a transient and unprofitable end; and, if the survivorship be established, it will be a clear violation of the intention of the testator, and the complainant will succeed upon a naked rule of law. Had Mr. Ball contemplated the death of his wife, within thirty minutes of his own, he would not have provided for her as he did. It was with a view to her prolonged existence and comfort that he made the liberal provisions, now claimed by her representatives, which were intended only for herself. There is, then, no reason to regret the result, if the decision should be, that the parties are decided to have perished together, and the estate should be disposed of accordingly. It is not one of the least inter-

esting circumstances, attending this thrilling tragedy, that on the 2d of April, 1836, Mr. Ball attached, to his will, a codicil, which' not being executed in due form of law, is inoperative, by which he actually anticipated the fate that befel him and his wife:—it is in these words, “should any accident occur, that my wife, Anna E. Ball, and myself should die at the same period, *or it was not certain whether she survived me*, and had made no disposal of the property left her in my said will, and should my adopted daughter Emma be alive, and I leave no heir of hers, then do I bequeath all my wife’s property, mentioned in said will, to Emma Ball, to be paid her when of age, but, if she dies before reaching the age of twenty-one, leaving no child or children lawfully born, then the property alluded to goes to whoever the law may direct to be entitled to the property, it would descend to said child or children.” This codicil, however, is only good, “provided my wife should make no disposal of the property she is entitled to. If she survives she has the right to do so, if she neglects to will away her property, this codicil will hold good in the event of her dying intestate”—strange to say, Mr. Ball added that, “as the above involves no real estate, I concluded witnesses unnecessary: see Grimke’s Law of Executors: H. S. Ball.” Since the publication of that book, the law has been *altered*, and witnesses were necessary; so that, if the codicil had been in fact executed in presence of witnesses, then the complainant would have had no claim, but the estate would have gone according to law. But if the strict law does carry over the estate to strangers to Mr. Ball, it will, of course, be acquiesced in. Still those, whose claim rests upon the rigid provisions of the law, have no cause to complain that the law should prevail, when in favor of their opponents. I only quote this codicil to prove that Mr. Ball, himself, intended, if his wife only survived him for a moment, contemplating some disaster from frequent travelling by sea, or if she did not dispose of her estate, it should

go as the law directs, to his own legal representatives. He contemplated the event that he and his wife might, as they did, perish together; and as it also might happen that Emma should survive them, he provided for her, but that failing, and if his wife did not survive to dispose of her legacy, it should go as the law provides. In short, if it was "not certain whether she survived," he had no other object of his bounty but Emma, and that failing, he was intestate. As it is admitted that this codicil has no legal operation, the question arises, did Mrs. Ball survive her husband, so that his bequest to her vested and descended to her legal representatives, or next of kin? or did both perish so nearly together, that no human testimony can establish that one, in fact, survived the other. If so, then the complainants fail. They claim upon the allegation, that Mrs. Ball did survive her husband. This is the allegation of a fact, to be proved by the party claiming the benefit of it; and it necessarily involves the allegation that *Mr. Ball, in fact, died first*. This renders it necessary, not merely to prove that Mrs. Ball was alive at any given period, but that Mr. Ball was actually dead, *prior* to that period; so that the facts to be proved, are the time when Mr. Ball died, and that Mrs. Ball was alive *after* that time. This positive, substantive fact, like every other, must be proven, not conjectured. If circumstances render it impossible to say when Mr. Ball was dead, then the survivorship of Mrs. Ball is simply not proved, and the complainants fail to establish their position. As to the mode and manner, in which the positive allegation that Mr. Ball was dead, at any given time, and that his wife was alive *after* that time, is to be established; the plain good sense, which heaven has bestowed on all mankind, is as competent to direct us to the conclusion, as the most extensive learning of the most erudite professors of the law, provided we exclude the arbitrary and often fanciful rules prescribed by the learned doctors of the civil law.

And I claim that, in this State, the rules of evidence prescribed by the common law prevail, and when they conflict with those assumed by the civilians they must preponderate. To enlarge upon this point would involve me in tedious and unnecessary diffuseness.

But the boasted rule of the Code Napoleon, over which civilians chuckle with so much admiration, so far as it adopts arbitrary rules, is subject to much cavil. The rule laid down is, in substance, that where two persons, who may inherit from each other, perish by one common calamity, and the fact, which died first, cannot be established by positive testimony—the next resort is to circumstantial evidence: so far, the rule is consistent with the common law, but the code then prescribes, if neither positive evidence, nor circumstantial evidence, can fix the fact of survivorship, certain arbitrary rules, which the stubborn good sense of the common law has not adopted. But, when neither positive, nor circumstantial evidence can establish the fact, which died first, the natural conclusion, that both perished together, is the only one to which the mind can come with any shew of reason. Indeed, the Chancellor seems to admit that his decree is based upon circumstantial evidence, and, without quoting authorities, I shall assume that as the true ground of the decision. But, in order to understand the argument, it is first necessary to define, clearly, the propositions to be established, or the fact to be proved. The claimants base their demand upon the fact, that Mrs. Ball survived her husband, which is exactly the same thing as alleging that H. S. Ball *died before* his wife; so that it becomes absolutely necessary to prove, either by positive, or circumstantial evidence, the precise period of his death, and then, that his wife was subsequently alive; any failure will be fatal. I take it, that it is one thing to prove that Mrs. Ball was living at a particular time, and quite another to prove that her husband was *then* dead.

Admitting, then, that the main proposition is to prove the time when Mr. Ball died, I will, after a few words upon the nature of circumstantial evidence, proceed to collate the facts.

The burden of proof is, clearly, on the complainants; uncertainty is to them fatal, and no mistake is greater than to suppose, that proving Mrs. Ball to be alive, at any period after the explosion, shifts the burden to the defendants, unless the very lame and impotent conclusion is insisted upon, that to prove the wife to be living, is *prima facie* evidence that the husband is dead. In truth, the defendants are passive; the complainants must prove by positive, or circumstantial evidence, not the existence of Mrs. Ball, but the death of her husband; and I will examine the rules of presumption on that point. That there is no positive proof when Mr. Ball died, is admitted. The fact of *his death*, not her existence must be proved by legal evidence, that is, facts which will establish it so satisfactorily as to amount to legal proof. If this cannot be done, then the survivorship is *not proved*. It is the error which has run through the reasoning of the complainants, that to prove Mrs. Ball alive, was to prove she survived her husband; when the time of Mr. Ball's death, alone, can enable them to shew her survivorship. Let us then examine the true principles of circumstantial evidence, and apply them to the facts of this case. The following contains the very pith and marrow of circumstantial evidence. "In consequence of the frequent failure of direct and positive evidence, recourse must be had to presumptions and inferences from facts and circumstances which are known and which serve as indications more or less certain of those which are disputed and contested. It is consequently, a matter of the highest importance, to consider the ground, nature, and *force*, of such presumptions, and to enquire what facts, either singly, or collectively, are capable of supplying such presumptions as can be safely relied on."

"The ground of all presumption is the necessary, or *usual* connection between facts and circumstances; the knowledge of which *connection* results from experience and reflection. A presumption may be defined to be an inference, as to the existence of a fact not actually known, arising from its necessary and *usual* connection with others that are known."

"The force of presumptions is almost intuitively perceived by all mankind, is recognized by the illiterate, as well as the learned, and acted upon daily, in the most momentous, as well as in the most common and trivial concerns of life. Presumptions could never have been adopted as the *means of proof*, before a jury, if their nature and force could not be estimated by men of plain, ordinary sense and discretion."

These rules are so obvious, that to state them is enough to challenge the assent of every well poised intellect. The fact, then, when did Mr. Ball die? can be as well decided by any intelligent citizen, as by the most adroit casuist. It is not necessary to follow the shadowy reasons of acute civilians, collected in libraries, but any traveller, sea captain, or man of experience, can put together the facts, and arrive at the true conclusion. It is not necessary, in this case, for us to show that Mr. Ball was alive; it is for the complainants to shew that he was dead, at the point of time when the main deck sunk and precipitated its occupants into the ocean; for the feeble frame and utter terror of the ill-fated lady of Mr. Ball, forbids the supposition, that she could have reached, or even used any means of safety, when once engulfed in the waves of the ocean; when the deck sunk, she too, perished. Here, then, we have positive proof of the exact time when Mrs. Ball died; it was not more than forty or fifty minutes, some say twenty-five minutes, after the boiler exploded. Having thus fixed the period of *her* death, beyond doubt, unless equally positive testimony is produced as to the period of Mr. Ball's death, and it is fixed prior to that moment, the usual presumption pre-

vails, that he was still alive. Many did survive that event, not only a few minutes, but days; and as Mr. Ball was a good swimmer, he may have caught a fragment of the wreck and survived a long time. As to Mrs. Ball, this was impossible; feeble, terror-stricken, and unused to the water, she, like every lady not on the promenade deck, must have perished instantly. So far from there being any proof that Mrs. Ball survived her husband, the evidence is fully competent to establish that he survived her. They were both well at supper. No cause of death occurred 'till the explosion. The testimony establishes at no one in the after cabin, except Judge Cameron, perished there. Mr. Ball had his berth there. It was near his wife: he had no motive to go to the forward cabin: no one was killed by the explosion in his cabin: it follows that no cause of death was brought to bear upon him prior to the sinking of the deck that certainly destroyed Mrs. Ball. It is *not certain* it destroyed him. Her death, then, being fixed, and not his, the presumption of survivorship is actually in his favour. The Judge, I think, has mistaken the law as to presumption of death. Death is a fact, and must, like all other facts, be proved by testimony. It is true that, for the purpose of convenience and in analogy to some statutory provisions, one who is absent from his friends seven years, and not heard from, is treated as dead. That is, his wife may marry without being guilty of bigamy; so if he have a life estate, the one entitled in remainder may take the estate; but, these are only rules of convenience. See Starkie on Evidence, p. 37. The man may not be dead, nevertheless. But, that a man, alive at supper time, is presumed to be dead at 11 o'clock at night, because he is not heard from, is preposterous. If death has overtaken him, it must be proved, not conjectured. "Where a fact is, in its nature, continuous, after its existence has once been proved, a presumption arises as to its continuance to a subsequent time." "So, where the existence of a particular indivi-

dual has once been shown, it will, within certain limits, be presumed he still lives." To prove that a man, who was living a few hours before, is dead, the cause of death must be brought home to him.

It is not enough that he has been exposed to danger. Thus, to prove that a man, well in the morning, is dead at night, it is not enough to shew that he has been in battle, where thousands perished; for, if the presumption prevails as to one, so it will as to every other one, and that would presume the whole army dead, contrary to the known fact; but here, unless Mr. Ball was in the forward cabin, of which there is no proof, there is no likelihood of his having been killed by the explosion; all the evidence concurring that no *one* was known to have suffered, in the after cabin, from that cause. Let us now consider a few of the rules of circumstantial evidence, and then apply them to ascertained facts. It is a species of evidence only resorted to, "because it is, in its own nature, capable of producing the highest degree of *moral certainty* in its application." Again, an able writer thus expresses it; "the force and tendency of circumstantial evidence, to produce conviction and belief, depend upon a consideration of the coincidence of circumstances with the fact inferred, that is, with the hypothesis, and the adequacy of such coincidences *to exclude every other hypothesis*." Here is the true clue to circumstantial evidence. The facts proved, must tend to one, only, conclusion; otherwise, it amounts only to "it might be so;" not "it is;" or, to use a very pithy expression, "the truth of the proposition is attained by negating and excluding the truth of any other hypothesis." Apply these rules to the admitted facts. The whole argument in favor of the survivorship, is this: "Mrs. Ball was heard to call, in a language and tone of deep distress, on her husband. He was a humane and brave man, and would, if living, naturally have responded to her call; but

no one of the few, who have survived, *saw him*, or *heard him; therefore*, he was dead at the time." This is all, absolutely all, yet the fact that none of the few survivors saw him, or heard him, does not prove that he was not there, neither does the fact, if proved, that he was not with his wife, prove that he was dead.* He might have been seeking some means to save her: he might have been looking for his adopted child, as suggested by my colleague, Mr. Memminger. But, in those few moments of terror and anxiety, when each was in dreadful extremity, looking for his own safety, it is not strange that he was not noticed. None of the witnesses had any interest in his fate, sufficient to direct their attention. It was dark: the mantle of midnight enveloped them: the lights were generally extinguished: the passengers, with their outer garments off, their heads bound in night handkerchiefs, would not be recognized with quickness and facility.

It is quite likely, too, that Mr. Ball was necessarily absent in looking for the means of escape, and actually returned to his wife, and found her so nervous and excited, as not to co-operate with him. Dr. Whitridge, many years her attending physician, states that she was easily excited, and liable to hysteria: her nurse and adopted child were not seen, yet they were safe after the explosion, they were not dead. The mere fact, then, that Mrs. Ball continued to call on her husband, which she would naturally have done, to save her, and that, of the few who survived, none remember to have seen him near her, raises not even a probability that he was dead. His *duty* led him away from her. Had he lingered by her side, or attempted to soothe her anguish, he would have neglected his higher duty to her and their adopted child, in providing the means of escape; and this leads us to the solitary fact which is in, any way, connected with Mr. Ball after the explosion;

Negative testimony, leads to no conclusion.

and it is one of those small incidents that so often point to the very truth. The polar star is among the smallest in the firmament, yet, still it forms the unerring guide of the wanderer on the pathless ocean. It was proved that, very shortly after the explosion, when one of the quarter boats was just lowered, a man came to the side of the vessel, and threw a coat in, saying, "hold on that boat an instant;" the request was not heeded—the boat pushed off to a respectable distance: but this coat was afterwards examined, when the boat reached the beach, and it proved to be a large sized coat, dark collar, and in the pocket, a collar marked "H. S. Ball." If this was Mr. Ball's coat, and he threw it into the boat, there is an end to the question. He is proved to have survived the explosion, and Mrs. Ball was exposed to the second cause of death, and there is no pretence for survivorship—and why was it not Mr. Ball's? Why, say the complainants, because somebody might have taken Mr. Ball's coat by mistake, and thrown it into the boat. It was not Mr. Ball, because it was *possible* that another man had his coat. That the coat was his, is all but certain; it is not, even by the guessing reasoning of the complainants, pretended that Mr. Ball put his collar into another man's coat, too, by mistake. If it was his coat, he put it in the boat. It is the natural conclusion that a man would take his own coat, because he knew where he put it. It is usual for men to take their own. It is a mistake to suppose otherwise. It is unusual for persons to take what does not belong to them. Then, the act shows a cool, firm man; he was prompt to prepare for escape, but he was a married man, too, else he would have jumped in after his coat; he, evidently, was providing for others, when he said, "hold on that boat." All these coincidences point to Mr. Ball, as the man, and not one is inconsistent with it: it is the *natural* conclusion. Then, shall the mere fact, that all the witnesses are dead, who saw him; that the few survivors did not see him, outweigh the presumption

that a living man continues to live, until a cause of death is brought home to him? Also, the facts, that not one was known to be killed in the after cabin, and that his coat was put into a boat, while he returned to bring his wife, and others under his care? I, thus imperfectly, I am aware, present to the court, the case of the executors of Mr. Ball; and conclude, that there is no legal proof that Mr. Ball was dead, at the time the witnesses heard the cries of his wife. That no human testimony can fix the time of his death, while that of his wife, is rendered almost certain. And thus, so far from the complainants' having established their survivorship, the weight of evidence proves that the husband survived. It is enough for us, that the fact is left unsettled. The burden of proof was upon the complainants; and they have failed to establish their position.

An attempt was made to set up an arbitrary rule, "that the last heard from is deemed to be the survivor," but nothing can be more unauthorized. The law no where recognizes any arbitrary rule of the kind, for it depends altogether upon the accidental circumstances—what witnesses survive to tell the tale? Two men are in battle, both perish, and the time when each or both died is not known, would the mere fact, that one was seen after the first volley, prove that he was the survivor? The error lies in inverting the proposition to prove a survivorship. The time of the death of the *first* party is the point to be fixed, and then the subsequent existence of the second, or survivor. Any other rule is arbitrary; but, however applicable such a rule might be, where parties might be missing for years, it has no application to a case where both died in a common catastrophe, and certainly within half an hour of each other. In this case, the rule prevails; that once alive, life is presumed to continue till death is proven; such is the settled law. The best modern decisions, concur that the only safe rule, is to decide, in the absence of conclusive testimony,

that both perished together. When Heaven has drawn a curtain around the scene, which human vision cannot penetrate, it is presumption to conjecture; and no good comes of such an effort to vest an estate for a few minutes of terror and dismay, and thus divert it from its legal channel. This is not so desirable as to induce us to strain the rules of evidence, and substitute mere conjecture for ascertained truth.

John Jenkins and others, Executors of William M. Clark, deceased, vs. John Hanahan and Elizabeth Mary, his wife, and Martha Mary Murray Clark, James Joseph Clark and Elizabeth Jenkins Clark, infants.

Executors are not entitled to charge their estate with the expense of an accountant to arrange their own accounts.

Devise of a plantation, called 'V.,' and "so much money as, with the said plantation, 'V.,' will be equal in value to the C. T. plantation, in lieu and to stand in place of so much land," is, as to the money, a general, not a specific bequest.

Bequest of all the slaves of which testator might die possessed, to be divided into three parts; one given to his widow and one to each of two children: general, not specific bequests.

Where an abatement had to be made, from bequests to children, for payment of debts, &c., it seems that the testator's distinctly expressed intention, to make the shares of the children equal, would overrule any technical distinction, (in liability to contribute,) between general and specific legacies, by which that equality would be disturbed.

Heard by HARPER, Ch., at Charleston, January, 1839.

Complainants' testator devised, among other things, as follows: "I give, devise and bequeath all my plantation, or tract of

land, usually called "Cypress Trees," containing about two hundred and twenty acres, unto my dear wife, Elizabeth Mary Clark, her heirs and assigns, forever. Item: I give, devise and bequeath, unto my dear daughter, Martha Mary Murray Clark, her heirs and assigns, forever, all my right, title, interest and estate in the plantation, or tract of land, commonly called "Vinegar Hill," that came from the estate of her grandfather, Joseph James Murray: and, as the said plantation is, in my opinion, less valuable than the plantations, respectively, given to my wife and other children; and, as it is my wish, that, at my death, my wife and each of my children be, as nearly as possible, on an equality, in regard to property, I give, devise, and bequeath, unto my daughter, Martha Mary Murray Clark, so much money as, with the said plantation, "Vinegar Hill," will be equal in value to the "Cypress" plantation, in lieu, and to stand in place of so much land, to her, and her heirs, forever. Item: I give, devise and bequeath the plantation, or tract of land, called "Shell House," unto my son, James Joseph Clark, his heirs and assigns, forever. Item: I give, devise and bequeath the plantation, or tract of land, called "Mulberry Grove," containing about two hundred and eighty acres, unto my dear daughter, Elizabeth Jenkins Clark, her heirs and assigns, forever. Item: It is, as I have already said, my desire that, at my death, my wife and children, respectively, should be, as nearly as possible, possessed of property of equal value; and, as my dear daughter, Martha Mary Murray Clark, under the deed of her grand-father, Joseph James Murray, to her mother, then Abigail Jenkins Murray, dated 23d February, anno Domini, 1815, will be, possessed, in her own right, of as many slaves as can fall to my present dear wife and her two children, on a division among them of all the negroes that belong to me, I therefore will, order and direct, that all the negro slaves, of which I may die possessed in my own right, be divided into three equal portions, or parts;

and that my negro slaves, Frank, Bob, Sarah and her children, Joe, Prince, John, Martha, Mary, Sam and Ben be included in one of these three equal parts: and I give and bequeath the one, of these three equal portions, in which the slaves designated are included, unto my dear wife, Elizabeth Mary Clark, forever, to and for her own sole and separate use," &c.

"Item: I will, order and direct, that the provision made by me, in this will, for my said wife, shall be in lieu and bar of dower and thirds, and all things else she can have a claim for, against my estate, real and personal. Item: I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, unto my dear wife and children, to be equally divided among them, share and share alike, to them and their heirs, forever."

The complainants, Executors of the deceased, stated that they had made a division of the negroes, according to the directions of the will, but that they were advised that, in consequence of the infancy of the children, (who were all minors,) the division was invalid, unless confirmed by the sanction of the Court. They submitted, further, that "the residue of the testator's estate has proved entirely insufficient to satisfy all the debts and legacies, which are chargeable thereon; and complainants are advised that it will be requisite, that the legacies should proportionably abate, to satisfy the said demands. And complainants are desirous of carrying into execution the provisions of the said will, and effecting a full and final adjustment of the testator's estate; but that questions have arisen and difficulties presented, as to the legal and proper manner of accomplishing these objects, and, more particularly, as to the payment of the testator's debts; whether, in order to satisfy said claims, all the legatees and devisees, without exception, shall contribute in proportion to the amount of their several legacies and devises; and also, as to

the difference, in value, between the "Vinegar Hill" and "Cypress Trees" plantations, how the same shall be ascertained and paid; and also, as to the mode of adjusting the accounts of the executors, in the administration of the estate; and whether a partition shall be made, by the authority of the Court, among the parties severally intitled, of the clear surplus which shall be found, after said adjustment, subject to such distribution.

Elizabeth Mary Hanahan, one of the defendants, formerly the wife of the testator, in her answer stated that the testator, after his intermarriage with her, had received, in her right, a number of slaves and about twenty-eight thousand dollars in money, and that the plantation, "Shell House," devised, by the testator, to his son, James Joseph, was her inheritance; that the devise to her was, by the express terms of the will, in lieu of these claims and of her dower, which would have amounted, together, to more than what she had received from the estate. She therefore denied the liability of her portion to contribute to the payment of debts, or legacies.

The case was referred to the Master, who reported;

1st. That the difference, in value, of the two tracts, "Cypress Trees" and "Vinegar Hill," was \$9,046.

2d. That Elizabeth Mary Hanahan was not liable to contribute for payment of debts or legacies, being, as to the devise and bequest to her, a purchaser for valuable consideration.

3d. That the partition of the negroes ought to be confirmed; there being, in fact, no objection interposed by any of the parties.

4th. That the complainants' accounts, as executors, were regular, correct and properly vouched; except as to certain charges for the expense of dissecting and arranging the accounts, which were disallowed by the Master.

To this report, the following objections were filed :

(*By the Complainant.*)—That the charge, in the accounts, for payments made to an accountant, for arranging the accounts, ought to have been allowed.

(*By the infant Defendant, Martha Mary Murray Clark.*)—

1. That Mrs. Hanahan is improperly exempted from abatement and contribution, to pay the testator's debts.

2. That this defendant is not credited, in the executor's accounts, as she ought to have been, with rent for the Vinegar Hill plantation; which was her property, under the will of her grand-father, Murray, and the produce of which has gone into the general funds of the estate; whereby she is made to contribute, out of her own property, to the payment of testator's debts, and legacies.

(*By the infant Defendants, James Joseph Clark and Elizabeth Jenkins Clark.*)—1. That the Master ought to have reported, that the devises and bequests to those defendants are not liable to abate, or contribute to the payment of the sum assessed, as the difference in value between Cypress Trees, and Vinegar Hill.

2. That he ought, further, to have reported the share of John Hanahan and wife, in the residuary estate of the testator, as liable to contribute, both to the payment of debts, and to the assessment in favor of the devisee of Vinegar Hill.

After hearing the argument on the report and exceptions, his Honor pronounced the following decree :

The Master's report presents a full statement of this case, and of the questions made.

With respect to the complainants' single exception, I think the Master's decision very well supported by his reasoning. It is sustained, also, by the decision of the Court, in *Logan vs. Logan*, (1 M'C. Ch. 5,) and in *Teague vs. Dendy*, (2 Id. 213.)

The first exception of the infant defendant, Martha M. M. Clark, and the second of the two infant defendants, James J. Clark and Elizabeth J. Clark, relate to the same matter. There is no doubt, on the authority of the cases referred to in the argument, that the provision made for testator's wife, being in bar of dower, she must be regarded as a purchaser of it, for valuable consideration; and, if the residuary estate should prove insufficient for the payment of legacies, she cannot be called upon to abate with the other legatees. *Burridge vs. Brady*, (1 P. Wms. 126,) *Blower vs. Morret*, (2 Ves. 420,) *Davenhill vs. Fletcher*,) Ambl. 244,) and *Loockock vs. Clarkson*, (1 Desaus. 471.) This, of course, does not apply to the share of the residue given to her. By a bequest of the residue, the testator means that which shall be left, after the payment of debts and legacies. The defendants, Hanahan and wife, are satisfied with the report. The exceptions are overruled.

With respect to the matter of the second exception of the defendant, Martha M. M. Clark, nothing appears in the report of the Master. It does not appear, that there was any shewing, before him, of the facts on which it is founded, nor any such question made: nor was there any shewing to the Court. I cannot, therefore, regard it as involved in the cause.

The first exception of the infant defendants, James J. Clark, and Elizabeth J. Clark, raises the question, how the legacy, or devise, to Martha M. M. Clark, of so much money as will make up the difference in value between the Vinegar Hill plantation, and the Cypress Trees, is to be made up. There is no exception to the assessment reported by the Commissioner: but it is apprehended that, after the payment of debts, there will not remain enough, of the residue, for the purpose; out of which fund, no doubt, the testator contemplated that it would be paid. Besides the provision for the wife, and some trifling specific legacies in the codicil, there remains only the land and stock, devised to the testator's children, and the

slaves given to the two younger children. The general rules on the subject are well known, that general, or pecuniary legacies must abate, rather than specific ones, and specific legacies of personalty, rather than devises of land. Questions might, perhaps, be made, whether the devise to Martha M. M. Clark is not to be regarded as a devise of land, privileged from abatement; or whether it is not a pecuniary legacy, which must fail, if there is not enough of the residue to pay it; and, with respect to the bequest of slaves, whether it is general, or specific. But, if the intention of the testator can be discovered, that is to govern, in preference to the artificial rules upon the subject. Of the intention of the testator, in the present instance, and the leading object of his will, there can be no doubt. Assuming that, by the provision made for her, by her grand-father, his daughter, Martha, is put upon an equality with his other children, in respect to slave property, (and with the correctness of his estimates, we have nothing to do, he might make his own estimates,) his distinctly expressed object was to put them on a footing of equality, with respect to the landed provision made for them. And how is this equality to be preserved? Very obviously, if there is not enough of the residue, to pay Martha the amount of the difference, in value, between the two plantations, all three of the children must abate equally. That is to say, if the whole residue should be exhausted by debts, Joseph and Elizabeth must contribute to Martha, out of their legacy of slaves, two-thirds of the amount reported by the Master. And so of any other deficiency of the residue: they must make good two-thirds of such deficiency.

It is ordered and decreed, that the Master's report be confirmed; that the complainants proceed to administer the estate, and, out of the residue, pay to the defendant, Martha Mary Murray Clark, the amount reported by the Master, as the difference in value between the plantations, called Vinegar

Hill, and Cypress Trees ; but, if the residue should not be sufficient for the purpose, that the infant defendants, James Joseph Clark and Elizabeth Jenkins Clark, pay two-thirds of such deficiency, out of the slaves bequeathed to them by the will of their father.

The infant defendants, James Joseph Clark, and Elizabeth Jenkins Clark, appealed from so much of the foregoing decree, as directs that, in the event of the testator's residuary estate proving insufficient to pay the sum of money assessed, as the difference in value between Vinegar Hill, and the Cypress Trees, two-thirds of such deficiency should be paid out of the slaves bequeathed to these defendants; and they moved that the same be reversed, or modified, in that particular, on the following grounds:

1. That the bequest of the said slaves to these defendants, was specific, and, therefore, not liable to abate, except for the payment of creditors.

2. That the bequest to Martha Mary Murray Clark, of the difference in value between Vinegar Hill and Cypress Trees, amounted to no more than a general pecuniary legacy; and no part of the estate, real or personal, specifically devised, or bequeathed, being expressly charged with the payment, it must either be paid out of the residuary estate, or fail altogether.

3. That, if the pecuniary legacy to Martha Mary Murray Clark, was a charge upon any part of the estate specifically devised and bequeathed, it was equally a charge upon the whole estate; and there was nothing, in the will, to warrant the selection of that part of the personal estate, bequeathed to these defendants, to bear a greater pro portion of the charge, than the value of the part, so bequeathed, bore to the whole estate.

4. That the decree, in the particular objected to, was contrary to the true intention of the testator, whether the same

be ascertained by the rules of law, for the construction of testaments, or is inferred from a particular interpretation of his will; and was, in every respect, contrary to law and equity.

The complainants also appealed on the ground stated in their exception to the report of the Master.

The defendant, Mary M. Clark, also appealed, on the grounds stated in her exceptions to the Master's report, and on the further ground, that, in case the residue should not be sufficient to pay the amount reported by the Master, as the difference in value, between Vinegar Hill and Cypress Trees, the defendants, James Joseph and Elizabeth J. Clark, ought to be required to pay the whole, instead of two-thirds of such deficiency, (as directed by the decree,) out of the slaves bequeathed to them, otherwise the testator's intention to put them on a footing of equality, as to the landed provision made for them, would be defeated.

Curia, per JOHNSON, Ch., The Court concur, generally, in the judgment of the circuit. Further explanations, however, in relation to some of the questions raised by the appeal, are thought necessary to the better understanding of the views of the Court, in relation to them.

1st. With regard to the claim set up by the complainant, to be indemnified for money paid to an accountant for arranging their accounts.

On looking into the report of the Commissioner, it will be seen that the accounts referred to were not accounts kept by the testator, himself, in such a manner as to require extraordinary skill, to adjust and arrange them; but, by the complainants, of their administration of the estate. The necessity of employing an accountant arose, therefore, out of their own negligence, or incompetence, and they must bear the burthen of it, *Teague vs. Dealy* and *Logan vs. Logan*; are conclusive of the question:

2dly. The Commissioner has reported the difference, between the Cypress Trees plantation, devised by the testator's will, to Elizabeth M. Clark, and the Vinegar Hill plantation, devised to his daughter, Martha M. M., at \$9,046 00, which is acquiesced in by all the parties. It is agreed, too, that the residuary estate is not sufficient to pay this sum and the debts; and two questions arise, 1st. whether the legacy to Martha M. M., of so much money as will make up the difference in value between Vinegar Hill and the Cypress Trees, must not fail for want of assets; and, 2dly. if not, whether she is not bound to abate, rateably with the other legatees, Joseph J. and Elizabeth J., to make up the difference.

The first question arises out of the assumption, in behalf of the widow and the legatees, Joseph J. and Elizabeth J., that the bequests of the testator's negroes, to be divided between them, is a specific legacy, and the bequest of money to Martha M. M., a general legacy; and the second, out of the assumption, on the part of Martha M. M., that the bequest of money to her is specific, and that of the negroes, to the other parties, general.

The testator, by his will, devised to his wife, Elizabeth M. M., the plantation called Cypress Trees, and to his daughter, Martha M. M., all his interest and estate in a plantation called Vinegar Hill, "that came from the estate of her grand-father, Joseph James Murray," and then proceeds thus, "and as the said plantation is, in my opinion, less valuable than the plantations respectively given to my wife and other children, and as it is my wish that at my death, my wife and children be, as nearly as possible, on an equality, in regard to property, I give, devise, and bequeath to my daughter, Martha Mary Murray Clark, so much money as, with the said plantation, Vinegar Hill, will be equal in value to the Cypress Trees plantation, in lieu of, and to stand in place of so much land." He then goes on to devise to his son, Joseph J., a plantation called Shell

House, and to his daughter, Elizabeth J., another plantation, called Mulberry Grove, and then proceeds, "it is, as I have already said, my desire that, at my death, my wife and children, respectively, should be, as nearly as possible, possessed of property of equal value; and, as my dear daughter, Martha Mary Murray Clark, under the deed of her grand-father, Joseph James Murray, to her mother, then Abigail Jenkins Murray, dated 23d February, 1815, will be possessed, in her own right, of as many slaves as can fall to my dear wife and her children, on a division amongst them, of all the negroes that belong to me: I, therefore, will, order and direct, that all the negro slaves, of which I may die possessed, in my own right, be divided into three equal portions, or parts;" of which, he gives one to his widow, one to his son, Joseph J. and one to his daughter, Elizabeth J.

As observed in the Circuit Court decree, a bequest of the residue of the estate of the testator, means what is left after the payment of debts and legacies, and it follows that the funds must be exhausted before the other legacies can be called upon to abate, or contribute towards it. If that fund fails, then the deficiency must be made up from the general legacies, rateably, before resort can be had to the specific legacies. About these rules there can be no diversity of opinion. The difficulty consists in their application. In determining what legacies are specific, and what are not. Now, a specific legacy is defined, generally, to be "the bequest of a particular thing, or money, specified and distinguished from all others of the same kind, as of a horse; a piece of plate; money in a purse, &c., which would immediately vest with the assent of the executor," (1 *Roper on Leg.* 149.) The terms of the definition, themselves, sufficiently import that, to render a legacy specific, the thing bequeathed must be so described as to distinguish it from the bulk of the testator's estate, and may be delivered in specie, as money in a particular bag, or chest, or

in the hands of C., or my horse, called Castor, (*Roper on Leg.* 135, 150--1.) So, a bequest of all the testator's property at B, he having property elsewhere, was held specific, *Sayer vs. Sayer*, (1 Vern. 688.) So, in *Nesbitt vs. Murray*, (5 Ves. 150--6,) where the testator gave some specific legacies, out of his estate in Jamaica, and bequeathed the rest and residue of his estate, in the said Island of Jamaica, to trustees, to sell and invest for certain uses, and then gave a variety of other legacies, Lord Alvanly held that this was a specific legacy of all testator's property in Jamaica, and that the generality of the terms, "all the rest and residue of my estate," were limited and controlled by the words, "in the Island of Jamaica," to the property there.

Now, if the dispositions of this will be analyzed, it will be found that the bequest to Martha M. M., is an uncertain sum of money, to be ascertained by a comparison between the relative value of Vinegar Hill and the Cypress Trees plantations, and there is no foundation for the assumption that it is specific. It wants the identity and certainty necessary to a specific pecuniary legacy. The legacies of negroes to Joseph J. and Elizabeth J. are of one-third part, to each, of *all* the negroes of which the testator might be possessed, at the time of his death; and there is nothing in this to distinguish the negroes bequeathed to one from those bequeathed to the other, and nothing to distinguish either from those bequeathed to the wife. In the execution of the trusts of the will, the negroes must be divided before the executors could assent to the legacies; they want, therefore, all the requisites of specific legacies. If, by a literal construction of the particular terms employed in this bequest, a different conclusion might be drawn, I think it might be sustained on the general provisions of the will. In the construction of wills, the intention, to be collected from all its provisions, must prevail over the particular phraseology; and, on this principle, it was held, by Sir Wm. Grant,

in *Page vs. Leapingwill*, (18 Ves. 463,) that a legacy, in terms, purporting a general legacy, was, notwithstanding, specific. Thus, A, the testator, devised certain lands to trustees, to be sold, but not for less than £10,000, and, believing that they would not, under any circumstances, bring less, disposed of fractional parts of that sum for the benefit of B and others, and directed that, after those legacies were paid, the *overplus* should be invested in public stocks, for the benefit of C & D. The lands were sold, under a decree, for less than £7000, leaving nothing after the legacies to B and others were paid; and the question was, whether C and D were entitled to any thing. Now, the term, surplus, clearly imports what was left after paying the legacies to B and others; yet, it was argued that C and D took with B and others, in the same proportion that they would have done, if the land had brought £10,000. The assumption by the testator, that the land would bring that sum, and basing his disposition of it upon that calculation, was regarded as restraining the general import of the word, *surplus*, to the meaning of a certain sum remaining of an ascertained fund, after paying out of it, the other sums specifically given.

The dispositions of this will express, very clearly, that the testator intended to make the fortunes of his wife and children as nearly equal as the existing state of things would permit, and especially, that Martha M. M., should be compensated for the deficiency in the value of Vinegar Hill, as compared with the real estate devised to his wife and other children. Over the negroes, which she derived from her grand-father, he had no control; but, assuming that they were of equal value with those which might fall to the shares of his wife and children, upon an equal partition, of all the negroes that he owned, amongst them, he evidently regarded them as standing upon a footing of equality, with regard to that species of property; and the bequest of money to Martha M. M., was evidently based in the supposition that his residuary estate was sufficient to

pay his debts and this legacy. If this must fail for want of assets, a leading object, (the equalization of their real estate,) will be defeated, and will necessarily produce an inequality against which he obviously intended to guard. If the deficiency is to be supplied from the legacies of negroes to Joseph J. and Elizabeth J., a like inequality results. If, therefore, we take the rule that general legacies must abate, rateably, to pay pecuniary legacies, or if the intention of the testator, collected from all the provisions of the will, prevails; it follows that the pecuniary legacy to Martha M. M. and the legacies of negroes to Joseph J. and Elizabeth J. must contribute rateably, to make up, to Martha M. M., the difference in value between Vinegar Hill and the Cypress Trees.

The appeal is therefore dismissed and the decree of the Circuit Court is affirmed.

HARPER and DUNKIN, Ch., concurred.

Peronneau, for Complainants; *King & Walker*, for Defendants, Hanahan *et ux*; *Finley*, for Defendant M. M. M. Clark; *Bailey & Brewster*, for Defendants, J. J. and E. J. Clark.

H. D. Duncan, Executor, vs. Daniel Tobin and others.

Where an executor exhibits such an account as will enable the parties interested readily to test its correctness, distinguishing between sums received on account of principal and those on account of interest, then the interest is to be set down to the year in which it was actually received.

But where, in accounting for the proceeds of sales of his testator's estate, the Executor has only charged himself with gross sums, as he received them, not distinguishing between principal and interest; he is chargeable with the amount of sales when due with interest on it annually, which, in striking the annual balances, will be set off against the disbursements of each year.

If only a part of his accounts are accurate and satisfactory, he shall have the benefit of them *pro tanto*.

Suggestions as to the proper mode of stating and vouching accounts before the Commissioner.

Heard, on the circuit, before the Hon. Ch. JOHNSON, in whose opinion, delivered in the Appeal Court, as below, the points made in the case are sufficiently set forth.

Curia per JOHNSON, Ch. This bill was filed to settle the claims of the defendants, (the legatees,) under the will of complainant's testator; and, in the progress of the cause, the complainant was ordered to account for his administration of of the estate. In stating the accounts, the Commissioner charged the claimant with the amount of sales, with interest upon it annually, and made up the annual balances by setting off the interest, in the first place, against the annual disbursements of the current year. The complainant excepted to the report, on several grounds, and amongst others, "for that the complainant having passed his accounts with the estate annually before the Ordinary, he is only chargeable with the final balance due on such accounts and with the interest on the annual balance. The Circuit Court referred the accounts back to the Commissioner, with directions as to this exception, that if, as it assumes, the complainant can exhibit a regular account of the interest received, to charge him with it at

the time it was received and carry it into the account current of the year. If not, that the account should be made up on the principle adopted in the report.

The defendants appeal from this order on the grounds:

1st. That there is no full and satisfactory return of interest; and, in the absence of this, the mode adopted by the Commissioner, is the proper and legal one.

2dly. Because the defendant can elect which mode he will adopt, and interest on annual balances has received the sanction of the Commissioner.

The whole of the testator's personal, and I believe some, or all of his real estate had been sold, and the complainant had taken bonds, or notes, from the purchasers, and in his annual returns to the Ordinary, he charged himself with the gross sum received, without distinguishing between what was received on account of principal and what on account of interest, so that it was impossible, without travelling through all the items and entering into minute calculation, to ascertain whether the interest account had been accurately stated; and this was rendered almost impracticable by the number and complexity of the accounts. This is the state of things to which the complainant's exception to the report of the Commissioner, and the grounds of this appeal refer, and but for the necessity of referring the accounts back to the Commissioner, on other grounds, I should not have subjected the defendants to further delay; but would, in this respect, have confirmed the report. The uncertainty, too, whether a correct mode of stating the account, which the solicitor for complainant thought practicable, would not result favorably for the defendants, was another motive, and I felt less reluctance, because, at the same time, a large proportion of what, under any circumstances, can remain due to the defendants, was decreed to be paid.

Parties interested in an estate have the right to know of what it consisted, and how it has been used and disposed of. For this purpose, executors are required, by law, to make an inventory of all goods, chattels, rights and credits of the deceased. If sales had been made, they are required to return an account thereof to the Ordinary; and, from year to year, to render to him an account of all their receipts and disbursements, which ought to exhibit the time when, the person to or from whom, and the account on which they were received or paid out, distinguishing between principal and interest; the correctness of which could be at once tested by a comparison with an inventory and account of sales. And the same particularity, for the same reasons, ought to be observed in accounting to this Court. The duties of one standing in the relation of executor or administrator, and the consequences of their neglect, are so clearly summed up in the well considered opinion of Mr. Justice Evans, in *Dickson, administrator, vs. the heirs of Hunter*, delivered in Columbia, at December term, 1836, that little remains to be said on the subject. "If," says he, "an administrator acts fairly—if he renders his accounts according to law, to the Ordinary, and exhibits by his returns a full and satisfactory account of his transactions of the trust, shewing when the funds were received and how they were disbursed, and that they had not been suffered to remain in his hands unnecessarily and unproductive, he has done all that the law requires of him; but, if he has neglected to keep it, and is unable to render a full, fair and just account of his administration, he must be charged with interest on all the funds in his hands, including all that were, or might, with ordinary diligence have been rendered productive."

The account stated by the complainant falls very short of the particularity required by these principles, and although it may be possible to test their correctness by a reference to the account of sales, yet, from my own observation, such is the

confusion in which they are involved, and their extent, that even a dexterous accountant who was a stranger to the circumstances, could not reduce them to order in a week, perhaps a month, and but for the reasons before stated, and the belief that it might subserve the purpose of justice, I should have sustained the Commissioner's report.

The complainant's exception to the Commissioner's report, before stated, seems to have been founded on a supposition that the complainant's returns to the Ordinary, were, in themselves, evidence on the reference before the Commissioner. They are prima facie evidence as to the receipts, for he can produce no other than that furnished by the inventory, the bill of sales, and the amount of monies received, which the opposite party would, of course, be entitled to surcharge and falsify; but, not so with regard to the disbursements; that is susceptible of other proof, and must be established and vouched according to the general rules of evidence.

The want of uniformity and frequent irregularity in the manner of stating and vouching accounts before the Commissioner, has suggested this, as a fit occasion to refer to some of the rules by which these matters are regulated.

According to the practice of the English courts, all parties accounting before the Master, are required to bring in their accounts in the form of debtor and creditor, accompanied by an affidavit containing a verification of the accuracy of the schedules in which are contained the details of the account; and, if any of the parties are dissatisfied with it, they may examine the accounting parties on interrogatories. If the party asking the account sets up a charge not admitted in the account, nor on the examination of the accounting party, he must substantiate it by evidence; when that is done, either by admissions or proof, the accounting party must discharge himself by the production of receipts, or other competent evidence, (*Smith's Practice*, 111, 2--3--4,) and proper attention

to these rules would relieve the Court from much embarrassment in the examination of the accounts taken before the Commissioner.

The appeal must be dismissed; but, it may be proper to remark that, the order of the Circuit Court must be carried into effect, according to the principles before stated. If the complainant is able to exhibit a sworn account in such form as will enable the defendant readily to test its correctness by the inventory and account of sales, distinguishing between the sums received on account of principal and interest, then, and to that extent, the interest is to be set down to the account of the year in which it was received, and interest computed on the annual balance; if not, the account must be made up on the principles adopted in the report. It may happen that the complainant may be able, in some instances, to state the account fully, and not in others; in that event, the rules laid down, must be applied to their appropriate classes of the items in the account—the first to those where the account is clearly and fully settled, and the last to such as are not made up in that manner.

DUNKIN, Ch., concurred.

Ch. JOHNSTON had left the Court before this opinion was prepared, and his signature does not, therefore, appear. He was understood, however, to concur.

Glover for the motion; *Patterson*, contra.

Thomas Dawson, Executor, vs. Richard P. Dawson and others.

D. disposed of all his estate by will, and afterwards, by deed, gave all his real and personal property to "my namd children in my will, and I do acknolege this day to be thern and no others then those that are namd in my will, and the use ther in menshend." This was a gift, irreyocable, of all that was covered by the will at the date of the deed; that is, of the whole estate, as then existing.

It was a gift, *in presenti*, to take effect at the grantor's death; but, in the mean time, a trust resulted to the grantor for his life. Therefore, after-acquired property, if purchased with the profits accruing after the date of the deed, belonged to the grantor; but otherwise, if paid for out of the *corpus*.

The will, referred to by the deed, was thereby fixed and rendered irrevocable, so far as it became a part of the deed; but, as to the after-acquired property, its energy and revocability as a will were not affected.

Bequests were made to children, provided that those, to whom negroes had been advanced, "will bring forward such negro or negroes, with their issue, or increase, to the division, to be justly valued as their, or part of their respective and equitable portions of the whole." Negroes so advanced, and since dead without increase, are not to be accounted for: those sold by the legatee, so that, by his own act, it is unknown whether they are dead or alive, will be presumed alive, and rated at their probable value at the time of the division. The same of those sold by the sheriff.

This case is but a continuation of that of *Dawson vs. Dawson*, reported in Rice's Eq. R. 243, to which the reader is referred. In obedience to the orders of the Court, as there stated, the Commissioner made a report, to which exception was taken by both parties. All the facts material to the points in this appeal are stated in the following decree of his Honor, Ch. JOHNSTON, January, 1840.

For the general history of the case I will refer to the decree of Chancellor Johnston, which was affirmed in the Court of Appeals, at January term, 1839. The case comes up now on exceptions to the report of the Commissioner, and I shall have occasion to refer more particularly to the facts connected with them.

The defendant, Richard P. Dawson, excepts to the report, on the ground, that the Commissioner rejected evidence, that

the other children of his father, Richard Dawson, the son of the testator, were illegitimate, and not entitled to share with him the legacy bequeathed to their father, who survived the testator, nor in the undivided estate.

There is no question about the legitimacy of the defendant, Richard P. Dawson ; but his father had three other children, whose legitimacy was seriously questioned on the original trial, and the Chancellor remarks, that he was "happy that the painful inquiry into the legitimacy of the three younger children of Richard Dawson, Jun., was not pressed. They will, therefore, be considered lawful children in after proceedings of the cause."

In support of this exception, it was stated at the bar, that the Chancellor was mistaken in supposing that Richard P. Dawson conceded the legitimacy of the younger children. However that may be, I think the evidence was properly rejected. The decree was imperative on the Commissioner, and if, as stated, there was a mistake, I suppose the correct mode of putting the matter right would be by petition to open the decree and let in the evidence.

Samuel Dawson, another defendant, excepts to the report, on three grounds. 1st. That the Commissioner has reported that the negroes acquired after the date of the deed, as well as the residue of his estate, passed by the codicil.

By referring to the decree of Chancellor Johnston, it will be seen that on the 2d of May, 1820, the testator made and executed a last will and testament, by which he bequeathed specific legacies to all his children, of unequal values ; and that on the 3d of June, 1821, he also executed a deed, which, in its legal effect, gives to the children named in his will, all his real and personal estate ; in which deed the following language is used, viz : "And I do acknowledge this day to be them and no others then those that are named in my will and the use therein mentioned." On the 9th of August, 1836, he formal-

ly executed a codicil to his will, in which he made a very different disposition of his estate from that expressed in the will, especially in revoking large legacies provided for his sons, John and Richard, and their children; and after giving various specific legacies to his other children, and grand-children, the following clauses occur in the order in which they will be recited, viz:

1. "The residue of the property real and personal, devised and bequeathed, by my will aforesaid, to my sons John and Richard, and their children, not disposed of by this codicil, I give, devise and bequeath as follows:

2. "To my sons Thomas and Josiah, I give, devise and bequeath, the whole of the real estate, share and share alike, to them and their heirs forever.

3. "To my said sons, Thomas and Josiah, and my daughter, Rebecca Ann M'Kenzie, (formerly Dawson,) I give and bequeath the personal property, share and share alike, to them and their heirs forever." Besides these there is no residuary clause in the codicil.

Between the execution of the original will and the execution of the deed, the testator acquired some slaves, and between the execution of the deed and his death, thirty-nine others; and two questions arise under this exception: 1st. whether the property acquired between the execution of the will and deed passed under the deed. And 2d. if not, whether that, and the property subsequently acquired, passed under the codicil; or whether, with respect to it, the testator died intestate.

The decree of Chancellor Johnston is referred to as concluding these questions: but on referring to it there can, I think, be no question, that they are expressly reserved. I shall, therefore, consider them open. The judgment of the Court was, that the deed attached upon the will, so as to render it no longer revocable, and took effect *in presenti*. It

could not, therefore, operate prospectively. One might, it is true, covenant on sufficient consideration, for the disposition of property to be subsequently acquired; but there is no such covenant in this deed. On the contrary, he acknowledges the property, "this day to be thern," excluding the idea of its referring to a subsequent period. It is clear, therefore, that the property acquired after the execution of the deed, did not pass under it.

The testator had given to his son-in-law, Samuel Marvin, seven negroes, and after the death of his daughter, (the wife of Marvin,) he took them back, contending that they were a loan. Marvin brought trover against him, and on the 17th April, 1821, recovered the value of the negroes, which the testator paid on the 20th of the same month; both being between the execution of the will and the deed. Six of the negroes and their issue are in possession of the executor; and the Commissioner has placed them in the list of negroes that passed by the deed.

The verdict in the action of trover is conclusive that the property in the negroes was in Marvin. The verdict and satisfaction vested the property in the testator, and these being between the execution of the will and the deed, they fall into the class of property subsequently acquired, and are subject to the same rule.

The other question is one of more difficulty. The terms, "all my real estate, and all my personal property, and goods, and chattels," used in the will, are certainly broad enough to cover any thing that he then possessed; but it is given to the children named in the will, whose legacies are unequal. The will contained no general residuary clause. Besides, the gift is to the uses mentioned in the will, and the will contains no declaration of the uses of property subsequently to be acquired. The deed cannot, therefore, act upon it. The uncertainty as to the division of it, or the uses for which it was granted, are

conclusive objections against it. The testator died intestate, therefore, as to all the property acquired after the execution of the original will. It does not pass under the codicil, for the clauses number two and three, although, when taken alone, they have the effect of general residuary clauses, so obviously refer to the property bequeathed in the will to his sons, John and Richard, that no argument could illustrate it. A different construction would operate as a revocation of all the specific legacies.

The second exception in behalf of Samuel Dawson, is, in substance, that the after acquired property ought to be charged with \$4,800, which the testator is supposed to have had in his possession at the time he made the deed, and invested in the property; but there is nothing in this. There is nothing in the deed, or the will, which proposes to dispose of money.

His third exception is that the complainant has not been required to account for the stock, and other perishable property, which the testator possessed at the time he made the deed.

This involves the principle considered under the first exception, and must be governed by it. The complainant must account for this property as part of the undivided estate, as there is no disposition of it in the will.

The complainant has also excepted to the report, 1st, because the commissioner has fixed the value of the advances to Richard Dawson, at the prices at which his negroes were sold in 1824 and 1828, instead of estimating them at their present value. 2nd. Because the commissioner has not charged the legatees with the value of negroes, advanced to them, who have died.

The testator had, before the execution of his will, given, or as he has expressed it in his will, *loaned* to his children, negroes, in various numbers, and amongst them, ten to his son

Richard, who sold one of them, who has been removed to parts unknown. The rest were sold at sheriff's sale as his property, and most of them were purchased by the testator himself. Of those loaned to his other children, some have since died.

In the 6th clause of his will, the testator gives to his sons Richard, Thomas, and John, and his three daughters, Jane, Providence, and Rebecca, all his personal property, negroes, horses, cattle, sheep, hogs, &c., share and share alike, "provided that those of the above named children, to whom I have loaned, or may hereafter loan, a negro or negroes, will bring forward such negro or negroes, with their issue or increase, to the division, to be justly valued as their, or part of their, respective and equitable portions of the whole." And the questions propounded in the exceptions arise out of these circumstances.

That the testator intended that the division of the property bequeathed, should be made with reference to the value of the negroes loaned, at the time of the division, is too obvious to admit of a doubt: they are required to be "brought forward to the division, with their increase, to be justly valued," and according to the letter of the will, an ingenious mind might possibly raise a question, whether the neglect of the legatee to bring forward those that are alive, does not deprive him of the right to participate in the division: but that is, perhaps, too narrow a view of the matter. It follows, however, that the legatees are not bound to account for the value of those that are dead. The principal difficulty arises out of those that were loaned to Richard Dawson. It is not known where the negro which he sold is, or whether she is dead or alive, and it is, perhaps, his own fault, or necessities, that it is now impossible to ascertain her value with certainty. In this state of things, it ought to be presumed against him, that the

negro is alive, and something like her present value may be ascertained by her age or description. The others are in the country, and there will be no difficulty in ascertaining their present value.

In regard to those sold by the sheriff, it is urged that he ought only to account for the prices at which they were sold, particularly those purchased by the testator. If the negroes were sold for less than their value, the usual consequence of a sheriff's sale, or if they have increased in number or value, as I infer from the exception, it is apparent that this rule would operate injuriously to the other legatees; as it would diminish their interest in the legacy, by the amount of the difference between the sales and the present value. The testator, as before shewn, clearly contemplated the present value, and that the negroes are not now the legatees', is the result of his own imprudence, or misfortune; and that ought not to be visited on the other legatees. I can make no distinction between those purchased by the testator, and strangers. In either case the effect is the same.

The complainant's second exception is, that the commissioner has placed the negroes acquired between the date of the will and deed, among those that pass by the deed. This question has been already disposed of. The negroes must follow the same rule as the other thirty-nine acquired after making the will, and be distributed, as in case of intestacy.

It is ordered and decreed accordingly.

This decree was appealed from by all the parties.

Curia, per JOHNSTON, Ch. On the former appeal in this case, it was settled, in conformity with the circuit decree, then examined, that Mr. Dawson conveyed of his real and personal estate, in possession at the date thereof, to the trustees therein named, to the uses of the will of 1820, being the particular

will to which the deed referred. That the trusts declared were those in that will particularly specified; and not those which the grantor might afterwards declare in any other last will.

That as the instrument referred to was a will, the trusts were evidently intended to take effect in enjoyment, on the grantor's death; and, that as none were declared, in the mean time a trust resulted to the grantor himself, during his own life. There are some expressions of the circuit decree, affirmed on that occasion, which have been misunderstood. (See Rice Eq. Rep. 259.) The Court, in those expressions, did not intend to deny that a grantor might convey to a trustee, to hold according to trusts, to be afterwards declared by him, either by deed or by will, though the phraseology employed is quite susceptible of that construction; and, indeed, upon re-examining them, that seems to be the most obvious sense of the Chancellor's remarks. The meaning, however, intended to be conveyed, was, that as the grantor, by his deed, made a present gift, through the intervention of a trustee, to such of his children already "*named*" in an existing will, according to the uses "*therein*" particularly "*described*" and "*gave up all*," he could not be supposed to have entertained an impression that there remained with him a power to make afterwards, either by deed or by will, any other declaration of trust inconsistent with that then made. A recurrence to what was decided on the former appeal will enable us to dispose of the questions brought before us now. The deed conveyed the property. It conveyed all the property, real and personal, then held by the grantor, and of course, included that which he acquired between the date of the will and that of the deed.

The trusts in favor of the children were vested, but were to be enjoyed at the grantor's death.

The intermediate interests resulted to the grantor himself,

and entitled him to all the profits which accrued during his life.

If, therefore, the after acquired property was purchased with those profits, it was his own exclusive property; but, if purchased with the corpus of the trust estate, it belonged to the children named in the will at his death. It has been supposed that the will lost its character and energy by the reference to it in the deed, and became a deed itself and incapable of disposing of property acquired by Mr. Dawson after the date of the deed. This is a misconception. Although, in conformity with the language of the cases, it was said the will was incorporated with the deed and lost its ambulatory and revocable character; no more was absolutely meant, than that the reference answered the purpose of borrowing the terms of the will as if they were transcribed into the deed, so as to form part of that instrument, which was of a fixed and irrevocable character. The will, itself, retained its standing, and was as capable of operating upon any property not withdrawn from it by the deed, as it was before, provided it contained (as the will of 1820 did) general provisions capable of receiving and carrying such property. Certainly the deed did not revoke it. The only modification which it underwent was by the codicil, which, so far from being a revocation, was a re-publication of it. The will and codicils, therefore, must operate upon so much of the property acquired after the date of the deed as arose from the profits of the trust estate, and so much as was acquired by an application of the corpus of the trust estate must go under the deed.

With respect to the slaves loaned to Richard, and which were sold, the Court is satisfied that, however hard it may be, he was, by the terms imposed in the sixth clause of the will, bound to bring forward the slaves, and their increase, to be valued at the division, and that they must be set down at their

value at the time. The former decree, as to the costs, must stand.

The commissioner will be governed by the principles of this decree. The circuit decree now appealed from, is modified according to the same principles.

HARPER and DUNKIN, Ch., concurred.

Colcock for the complainants; *Petigru* for the defendants.

AT COLUMBIA, MAY, 1840.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,
HON. JOB JOHNSTON,
HON. B. F. DUNKIN.

John Massey et al. vs. Sarah Massey.

The A. A. 1821, fixing the *receiver's* fees, applies not only to Commissioners, but equally to all other persons appointed receivers.

The Commissioner in Equity had allowed to Wm. R. Gibson, as receiver of the estate of John Massey, deceased, two *per cent.* commissions, on all monies received, and one *per cent.* on notes and bonds uncollected. The receiver filed exceptions to the Commissioner's report, on the ground that "he should have been allowed five per cent., viz: 2½ per cent. for receiving and 2½ per cent. for paying out; the same commissions which commissioners are, by law, entitled to receive."

The exception was overruled by his Honor, Ch. DAVID JOHNSON, at Chambers, and from his decision an appeal was taken, on the same ground.

JOHNSON, Ch. The assumption that the act of 1821, (p. 9,) was intended to provide only for the case when the Master or Commissioner of the Court should be appointed receiver, is the only foundation of this appeal. But the object of the Act is so clearly expressed, and the terms are so broad, that no argument can more fully illustrate that it was intended to embrace all receivers appointed by the Court.

The difficulty of procuring fit persons to take the care and management of funds, the custody of which devolved on the Court, often led to the appointment of the Master or Commissioner as receiver; and, as in these cases the service was rather forced on them than sought for, no security was required. The occasional insolvency of those officers, and the consequent loss to the parties, was obviously the foundation of some of the provisions of the Act referred to. Before that time no compensation for receiving had been provided by law, and the Court had been driven to resort, by analogy, to the compensation allowed by law to executors, administrators and trustees, to make them compensation; and the object of the Act was, unquestionably, to provide for those evils.

The first clause of the Act provides, therefore, that if the Master or Commissioner in Equity shall be appointed receiver by the Court, and shall accept the appointment, he shall execute a bond to the Judges, for the faithful discharge of his duties: and the second clause provides "That *every receiver* hereafter appointed by the said Court, shall be entitled to receive and retain for his trouble as receiver, in preserving and managing all property whatsoever committed to him, and in receiving, investing and paying over all monies, bonds, notes, accounts, and choses in action, and for all duties whatsoever, as receiver, the sum of two per centum upon the amount he may receive in money, from the collection of bonds, notes, accounts and choses in action; and one per centum on the good and valuable choses in action not collected by him, and the

same on the real value of every other kind of property preserved and managed by him, and no more."

Now the terms "every receiver hereafter appointed by the Court," cannot, by any reasonable or plausible construction, be limited to the Master and Commissioner of the Court, and when it is recollected that the same necessity existed for providing a compensation for all others that might be appointed receivers, it cannot be supposed that it was intended to provide for them only. If it were otherwise, and the amount of the compensation was discretionary with the Court, the services being in all respects the same, the Act would furnish an uniform, certain and safe rule.

It is therefore ordered that the appeal be dismissed.

The whole Court concurred.

W. W. Geiger vs. Harman Geiger et al.

The Commissioner has a sufficient warrant for paying over a wife's distributive share to the husband, (upon the joint receipt of husband and wife,) in a general order of court to pay the parties according to their respective rights.

This was a case of partition. The Commissioner had been ordered, at a previous term, to pay the parties according to their respective rights. Mrs. Bell, the wife of George Bell, was one of the distributees, to whom the commissioner refused to pay her share without an order from the court; resting on the authority of *Yeldell vs. Quarles*, and *Hallaway vs. Moore*, (Dudley Ch. R., 55.)

Curia per HARPER, Ch. It is sufficiently settled, by the cases referred to by the Commissioner, and that of *Wray vs. Wardlaw*, (2 Hill Ch., 644,) that the Commissioner is not at liberty to pay over the money of a feme covert, in his hands, to her husband, without the order of the court. And, in *Yeldell vs. Quarles*, it is determined that he will not be directed to pay it over, unless upon the wife's joining in the receipt. I do not at all doubt but that it would be within the competency of the Chancellor, if there were any reasons to require it, to direct that the wife should be separately examined. But, in this case there was a general order to pay over to the parties according to their respective rights. This order must have some effect, and I do not perceive what effect it would have, with respect to the money of the feme covert, unless it were to authorize the Commissioner to pay it over upon her joining in the receipt. We think he would have been justified in so paying it over, and he is directed accordingly.

JOHNSON and DUNKIN, Ch., concurred.

Wm. Clark vs. Wm. Makenna and Wife.

Property settled on an intended wife,—to be her exclusive property and at her disposal, without being subject to the debts of her intended husband, or to any interference by him, but first to be liable for her own debts and contracts. *Held* liable for her note, given for family supplies, without looking into the propriety or necessity of the expenditure.

Previous decisions, in relation to the liability of wife's separate estate, reviewed.

Heard at Lancaster, July, 1839, by Ch. DAVID JOHNSON, who decreed as follows:

Before the marriage of the defendants, in October, 1835, they entered into a marriage contract, wherein it was stipulated that a considerable estate, which Mrs. Makenna inherited from her father, and certain slaves, (a man called Alfred and a woman named Dinah and her future increase,) should be the exclusive property of Mrs. Makenna, and be at her own disposal, without being subject to the debts of her intended husband, or to any interference by him; but first to be liable for her own debts and contracts. No trustee is nominated in the contract. The complainant states, in his petition, that he carried on merchandize in the village of Lancaster, where the defendants resided, and that Mrs. Makenna bought goods, in his and the other stores in the village, which, by her directions, were charged to her own separate account; and that this was notorious to her husband. That, on the 17th August, 1836, Mrs. Makenna borrowed of complainant \$32, for which she gave her note, representing that her husband was from home, and that she wanted money to purchase flour for the use of the family. The prayer of the petition is, that the defendant, Wm. Makenna, may be decreed to pay the note, or that it may be decreed to be paid out of the separate estate of Mrs. Makenna.

Mrs. Makenna has not answered, and to save the necessity of compelling an answer, it was conceded, on the part of Wm. Makenna, that she would admit the facts stated in the petition. Mr. Makenna denies, in his answer, all knowledge of the transaction, as well as of the necessity of purchasing flour for the family use, or to what use the money borrowed was applied. He submits that he is not personally responsible, nor the separate estate of his wife.

There was no evidence that the money was applied to the uses of the family, except the admission of Mrs. Makenna, implied from the concession that she would, in her answer, admit the truth of the facts stated in the petition. That would not be evidence against the husband, and consequently, there is no foundation for the claim on his personal responsibility. The only question, therefore, is whether the separate estate of Mrs. Makenna is liable.

The doctrine of the English courts is, that a married woman, having a separate estate, has the same power over it as if she was sole, and that she may grant, convey, or charge it. If she make a bond, note, or bill, or other agreement, the Court of Equity will direct satisfaction out of her separate estate: *Wagstaff vs. Smith*, (9 Ves. 524;) *Essex vs. Atkins*, (14 Ves. 542;) *Bullpin vs. Clark*, (17 Ves. 365;) *Norton vs. Turvill*, (S. W. 144.) I refer also to the remarks of Judge Nott, in *Trazier's Trustees vs. Hall et al.*, (1 M'Cord's Ch. 275.) The case of *Ewing vs. Smith*, (3 Equity Reports, 417,) seems to have been understood as conflicting with this doctrine. The principle there laid down is, that the wife has no other or further power over her separate estate, than she derives from the contract, deed, devise, or settlement which conferred it upon her: and it was held, in that case, that the wife was not bound by a bond given, for the debt of her husband, with a view to charge her separate estate, although she was entitled to the annual profits, and might, when received, dis-

pose of them as she pleased. She could not create a charge on them by anticipation, even with the consent of the trustee; and my brother Harper, in *Magwood & Patterson vs. Johnston*, (1 Hill's Ch. 236,) after a review of all our own cases on the subject, concludes that a wife cannot, by her own act, charge the separate estate, and that the court, before it will make it liable, will examine the circumstances and be satisfied of its necessity and propriety.

In that case, the question has been so fully considered that a further review of the authorities would be useless and unprofitable, and I will only revert to the principle laid down in *Ewing & Smith*, that the wife derives her power over the separate estate solely from the instrument by which it is conferred upon her.

A want of reference to this principle strikes me as having given rise to some confusion in our own cases, and was, probably, the foundation of the departure from the English rule.

If a marriage settlement, or other agreement, conferring on the wife a separate estate, clothes her with power of contracting debts and charging her separate estate with the payment, I presume there could be no question about her authority; so that, in every case, the question is, whether the power is expressly or impliedly given; if the question were now open, I should strongly incline to the opinion that it ought to be implied, in all cases, to the extent of the wife's dominion over the estate;—to the *corpus* of the estate, if that was subject to her control, and to the income, only, if her powers were limited to that. In the case in hand, the power of contracting debts and thereby charging her estate with the payment, appears to me to be expressly reserved to the wife, in this marriage agreement. It expressly provides that the property shall be at the disposal of Mrs. Makenna, and not subject to the interference of her intended husband, but shall be "first liable for her own debts and contracts." Now, the power to contract

debts, it is true, is not expressly given, but it is necessarily implied by the covenant that her separate estate should be liable for them. I think, therefore, that the separate estate of Mrs. Makenna is chargeable with this debt ; both the income and the corpus, if the first proves insufficient. There is no trustee named in the contract, and that duty, according to established rule, devolves on the husband.

Let the defendant, Wm. Makenna, account before the Commissioner for the rents and profits, or other income of the separate estate of Mrs. Makenna, and, on the coming in of the report, the proper order will be made to give relief to the complainant.

From this decree the defendants appealed : but,

Curia, per JOHNSON, Ch. We concur in the decree of the Circuit Court. The appeal is therefore dismissed.

HARPER and JOHNSTON, Ch., concurred.

Clinton, for the motion.

Samuel Price and others vs. Cuthbert Price, executor of Cuthbert Price, deceased.

A son, who had lived with his father and served him, as an overseer, many years, with an understanding that his services were not to be gratuitous; but who, in consequence of intimations that he would be more than paid after the old man's death, forbore to demand compensation; was entitled, on the death of his father, who left him nothing by his will, to the value of his services out of the estate.

The son's forbearance to press his demand having occurred in consequence of the intimation that it would be satisfied after his father's death, the Statute of Limitations did not commence to run, against any part of it, 'till the father's decease.

Heard before JOHNSTON, Ch., at Chester, June, 1837.

Bill against Cuthbert Price, Jun., as executor and administrator of the deceased, his father, to compel a distribution. The defendant set up a claim, on his own part, of \$200 a year, for personal services, for eight years, as overseer to the testator. Upon a reference, the commissioner reported against his demand. The report was excepted to and the exception partially sustained; as appears by the annexed extract from the decree of his Honor Ch. JOHNSTON.

The first exception of the defendant appears to be well founded. From the testimony, it appears that defendant went to live with the testator and to perform service for him, at his instance and request. There was no stipulation as to compensation.

If services are rendered without any express stipulation as to price, the law raises an implied contract to pay as much as they are worth; unless there was an interest, on the part of him who renders them, not to make a charge, or a reasonable expectation, on the part of him who receives them, that he is to receive them as a gratuity.

I think there is no evidence, here, that the defendant intended, or that the testator expected, a gratuity. On the contrary, the father intended, and the son expected him, to make compensation. It is true that the father intended to make that compensation in a legacy, (far exceeding, perhaps, the value of the services;) and the son, in consideration of this superior remuneration, part of which would have been a gratuity on the part of the father, forbore to press his demands. But the legacy formed no part of the contract between them. The contract consisted, simply, in the son's undertaking and performing services at the instance of the father. If there was no understanding that they should be gratuitous, they form the consideration of an implied promise to pay for them: *Ward vs. Turner*, (2 Ves. Senr. 444.) There is nothing in *Trammel vs. Salmon*, inconsistent with this view. On the contrary, it is admitted, in that case, that, if the evidence had not shewn an intention not to charge, the son-in-law would have been entitled to his demand for boarding the mother-in law. Here, there is no evidence to rebut the presumed intention. The difference between the two cases is in the evidence, and not in the law.

But take the case supposed by the commissioner. Suppose that the son had served the father in consideration of a promise to give him, by will, all his after acquisitions. The son performed his part of the contract: the father failed in his. Shall the breach of a contract be received as a reason why it should not be performed? Does a man become released from his obligations merely by violating them? I think, on the contrary, that the failure of the father to perform his contract lays the strongest foundation for the interposition of this Court, to remunerate the son.

The case of mutual wills stands on this principle, and this alone, that, when one performs and the other fails, this performance is the foundation for a decree: *Izard vs. Myddleton*,

(1 Des. Eq. 116, *notes*.) That principle applies with all its force to the case supposed by the commissioner, and would conduct us, I think, irresistibly, to the conclusion that, if the contract had been, that the son was to be paid by a legacy of the after acquisitions, a decree ought to have been given for them. But this was no part of the contract. It was, simply, that the son should serve and should be paid. To this he is entitled.

It appears, however, that the son and his family were supported by the father; that the latter paid his accounts and discharged his contracts. These advances should be discounted against his wages. If actual proof cannot be obtained, of what the son's expenses were, general estimates, or circumstantial evidence, of what the son must have cost the father, annually, in this way, may be resorted to.

With this direction, the exception is sustained and the report re-committed.

The commissioner, in a second report, made in obedience to the above decree, estimated the amount due the defendant at fifty dollars *per annum*, during the time he had lived with his father.

To this report, both parties excepted; the defendant because the amount was less than the evidence entitled him to, and the complainants on the ground that the defendant's claim, except for the last four years, was barred by the statute of Limitations.

The case was heard, on these exceptions, in June, 1838, before his Honor, Ch. DUNKIN, who made the following decree:

The only question submitted to the consideration of the Court is, the amount of compensation to be allowed to the defendant, for services rendered to the testator. The defend-

ant insists that the annual allowance reported by the commissioner, is too small; and the complainants interpose the plea of the Statute of Limitations to any account or demand beyond four years prior to the testator's death.

Cuthbert Price, Sen'r., the testator, and father of the defendant, made his will in July, 1826. At that time his wife was alive, and all his children were settled off; the defendant, who was the last, having married in the December previously, and shortly afterwards removed about one and a half miles from the testator's place. It appears from the testimony, that the defendant was far advanced in years; and in a conversation with one of the witnesses, John Price, the old man said "he wanted Bird, (the defendant,) back, and he could hardly do without him," To another witness, Tobias Phillips, he said "he must have him, (defendant,) back to live with him, that his negroes were neglecting their business, and that he was too old and infirm to attend to the negroes and horses, and that he must have him, let it cost him ever so much." In three or four months after the defendant's removal, the testator moved him back; "and the defendant and his negroes, and the testator and his negroes, all worked on the old man's plantation together." At first, the defendant and his wife resided in a house about one hundred yards from the testator. In September, 1826, Mrs. Price, the wife of testator, died. Some time after her death, the defendant removed into the house with his father, and so continued to reside with him until the testator's death, in 1834. The defendant's wife died in September, 1828, and he again married in the fall of 1832.

In a former report, the commissioner had rejected altogether, the claim of the defendant to compensation for the services of himself and his wife. On exceptions filed, the Chancellor, at June term, 1837, reversed the decision of the commissioner, in respect to the allowance of compensation for the services of the defendant, and directed the report to be

re-committed. The commissioner, in his last report, recommended an annual allowance of fifty dollars, and the defendant has excepted to this, as manifestly inadequate according to the testimony submitted.

A very careful review of the testimony has left on my mind an impression, the same as seems to have influenced the Chancellor who pronounced the previous decree. It is a misapprehension that this is an attempt to convert into a charge what was originally intended as a gratuity. When Cuthbert Price, the younger, at the request of his father, gave up his own establishment and returned to take charge of the testator's business, it was evidently not the understanding of either party that his service was to be gratuitous. The uniform declarations of the testator shew his consciousness of what was due to his son; his recognition of the understanding between them, and that he intended to provide liberally for him, as a compensation for his acquiescence in his wishes, and his conduct in his employment. It is not less clear, from the testimony, that this was the expectation of the son.

If the son was content to wait for his remuneration until the decease of his father, and, from any cause, the testator failed to fulfil his promise, I think, in the language of the Chancellor, that so far from relieving his estate "the failure of the father to perform his contract lays the strongest foundation for the interposition of the Court, to remunerate the son." I think the testimony, too, well warrants the presumption of an agreement that, in consideration of the services to be rendered by the defendant, the testator would, at his death, provide for him at least as much as the management of his business was reasonably worth. Nor do I think that this view does full justice to either party. The son was married and had commenced life on his own account. The father's declarations to Phillips, shew that he did not expect him to sacrifice either his plans or his independence for a trifle. Neither party believed that the son

was to be placed on the footing of a common hireling, or to be paid as such.

It is admitted that the ordinary wages of an overseer for such an establishment, is about two hundred dollars per annum. As far as I can gather from the testimony, the defendant appears to have been well occupied, not only in the ordinary duties of an overseer, but in attending to other matters which are said not properly to belong to this station. But, it is said, the crops prove that he is not entitled to the wages of a competent and faithful overseer. This is not always an infallible criterion; nor, does it seem to me, strictly applicable to this case. No person was so well qualified, or had so good a right to judge of the competency of his overseer, or of the manner in which his affairs should be conducted, as the testator himself. His lands were much worn—he had many small negroes—he was, himself, much advanced in life, yet, frequently attending to plantation affairs, and the son went with his cotton to Columbia, or was engaged in wagoning on his father's account, or in settling his other business. Under these circumstances, it may readily be conceived that large crops would not be made, and were not expected; and yet, that the services of the son were quite as important and useful to the father, as those of the most exacting overseer. It may be remarked, also, that the affairs of the testator continued to improve. He added another tract of land to his farm, and paid for a family of negroes which he had purchased. When it is considered that the defendant had abandoned his own arrangements, and devoted to the service of his father eight of the best years of his life, I think it is in fulfilment of the uniform understanding, that a liberal remuneration should be allowed. Some of the witnesses, who had frequent opportunities of observing the conduct of the defendant, estimated the value of his services during the several years at from two hundred to three hundred dollars. All the witnesses except one,

I think, agreed that the ordinary wages to an overseer of such a force as that of the testator, is two hundred dollars. It has been seen that the duties and the services of the son were not confined to the employment of an ordinary overseer.

When, in 1834, the defendant expressed a desire to remove to the West, he was dissuaded by the testator, who then repeated the assurances of full satisfaction for his services. On the whole, I think, that these engagements of the testator are fulfilled in moderate measure, when his estate pays to the defendant no more than he would himself have been compelled to pay to an overseer, who had faithfully superintended his plantation.

The view I have taken, disposes of the Statute of Limitations. It was not the understanding of the parties, that the defendant should be compensated until the death of the testator, and the right did not accrue until that event.

It is ordered and decreed that the case be re-committed to the commissioner, with instructions to reform his report, by allowing to the defendant credit as of the date of the sales bill, for the sum due for his services while in the employment of the testator, estimating the same at the rate of two hundred dollars per annum.

From this decree the complainants appealed, on the ground of the Statute of Limitations; and also because his Honor ought to have ordered the debts and expenses of the defendant, paid by his father, to be discounted against his demand.

Curia, per DUNKIN, Ch. The Court sees no cause to revise either of the decrees which are the subject matter of appeal. Nor is it perceived that the supposed discrepancy exists. The decree of June, 1838, merely fixes the amount at which the defendant's services should be estimated. If the testator furnished any supplies to the defendant, not usually allowed to

an overseer, or paid his accounts, there is nothing in the decree of June 1838, which would prevent the commissioner, in making up the account, from discounting (in the language of the former decree,) such advances from the annual sum at which the services are directed to be estimated.

The decrees are affirmed, and the appeal dismissed.

JOHNSON, HARPER and JOHNSTON, Ch., concurred.

Mills, for the motion.

Elisha Blackman, executor of Samuel M'Corkle, vs. John Stogner.

The genuineness of a note, sealed and attested, being called in question before the Commissioner, the signature of the maker was proved by three witnesses; that of the attesting witness was not proved, and two witnesses thought it spurious. The Commissioner reported the note as genuine, and the Chancellor on circuit, confirmed the report. Notwithstanding which, the Court, under the circumstances, ordered an issue at law to try the question.

According to English authorities, the signatures of subscribing witnesses to a bond or note must be proved; and so it seems to be here: but the A. A. 1802, [2 Faust, 453,] dispensing with such proof, in certain cases, unless the defendant deny, on oath, that the signature is his, ought to be recognized in its spirit, though not capable of a literal application to the Equity jurisdiction.

But, if proof of attesting witness's hand writing was not necessary, yet the fact of there being evidence against its genuineness, raises such a doubt as to make a fit case for a jury.

This was a bill to compel the defendant to deliver up to the complainant, executor of Samuel McCorkle, deceased, three negroes, the property of the testator, mortgaged to the defendant, to secure a debt of \$308, upon payment of that and other debts owing by the testator to the defendant. The defendant, in his answer, enumerated the various debts which he contended were due to him from the testator; and the Chancellor referred the case to the commissioner to balance the accounts between the parties, and ordered that, when they were settled, the negroes should be delivered to the complainant.

The commissioner reported, among other things, a sealed note, (not mentioned by defendant, in his answer,) for \$100, payable to defendant, bearing date, 4th July, 1831, signed by Samuel M'Corkle, as obligor, and witnessed by William Stogner. This note was disputed and resisted as spurious.

The commissioner says,

"Three witnesses, Messrs. Makenna, P——, and Hancock, were introduced on the part of the defendant, each of whom

was acquainted with the hand writing of M'Corkle. The witness, Hancock, testifies that he was well acquainted with the hand writing of M'Corkle, having, whilst M'Corkle merchandized, attended to the posting of his books, and having, as magistrate, collected from him a number of his notes. The witnesses, on comparing the signature to this note with the signatures of M'Corkle which they undoubtedly knew to be genuine, were still confirmed in their opinion that it was a genuine signature. Only one witness, Sistar, was introduced, who doubted the genuineness of the signature of M'Corkle. He also, did not believe the signature of the witness, William Stogner, to be genuine; and he testified that he was well acquainted with the hand writing of both M'Corkle and Stogner. Yet, in his cross examination, upon folding up several of the signatures of M'Corkle, and shewing him the name of Samuel M'Corkle, only, he was puzzled to determine which was or was not genuine. He likewise professed that he knew the signature of M'Corkle to the mortgage. Yet, on being shewn the signature, only, of M'Corkle to the bill, one dollar note and mortgage, and being asked which was the signature to the mortgage, he pointed out the signature to the bill. Messrs. Lanier and Mayer were also examined as to the signature of Wm. Stogner, the witness to this note. They only testified that his signature to this note was not written in the way he usually wrote his name about the time the note purports to bear date: neither of them affirmed that it was not his hand writing. All the signatures of M'Corkle bear a striking resemblance to each other. There is a great deal of conformity in them, and the hand writing of the signature to the note has a very strong resemblance to the signatures which are admitted to be genuine,—a complete fac-simile."

The commissioner determined that the note was genuine. To this the complainant took exception, before his Honor,

Ch. JOHNSON, at Lancaster, July, 1839, who decreed as follows :

“In stating the accounts between the parties, the report charges the complainant with \$100, the amount of a note purporting to be made by his testator to the defendant; and the complainant excepts to so much of the report, on the ground that the weight of evidence went to shew that the note was not executed by the testator; and, in the argument, the solicitor of the complainant asked for an issue at law to try the question.

“Generally, the Court will lend a ready ear to applications for an issue at law to ascertain the truth of doubtful and much contested questions of fact. But the facts stated in the appeal appear to me to lead irresistibly to the conclusion, to which the commissioner arrived, that the note was made by complainant's testator, and was, therefore, properly charged against him. Believing, as I do, that the question admits of little doubt, I should do injustice to the parties, to subject them, even on their own application, to the expenses of an issue at law, and the consequent delay.”

The complainant appealed, on the grounds,

1. That the Chancellor erred in coming to the conclusion that the testimony authorized the commissioner's report of the amount of the note as chargeable against the testator.

2. Because, under the circumstances, the Court should have ordered an issue.

Curia, per HARPER, Ch. It is true that this Court will very rarely overrule a decision upon matter of fact in which the Chancellor and the Commissioner have concurred. There is less reluctance, however, in submitting the question to a jury,

if the evidence be doubtful; and, more especially, if the credit or character of witnesses or parties, be involved.

The question is of the execution of the note, or single bill, to the defendant. The signature of the maker was proved in the usual way, by witnesses, acquainted with his hand writing, and by comparison of hands. And, if this were all, we should concur in the conclusion of the Commissioner and Chancellor. But, the hand writing of the subscribing witness is not proved. The witnesses say that his signature is not written in the way he usually wrote his name about the time the note purports to bear date, and neither of them affirmed that it was or was not his hand writing. It is rather disproved. And, upon comparing this signature with the witness's signature to the mortgage, executed three days before the note bears date, the difference is so marked, as to give rise to strong suspicion that the former, if written by the witness at all, must have been written after a considerable lapse of time, when the character of his hand writing had materially changed.

There is no doubt, but that, by the English authorities, it is necessary to prove the hand writing of the subscribing witness. The only question which has been made is, whether it is necessary to prove the hand writing of the maker or obligor also; and indeed, it seems to have been settled, that this is not necessary. *Adam vs. Ker*, (1 Bos. & Pul. 360;) *Milward vs. Temple*, (1 Camp. 375.) By the Act of Assembly of 1802, (2 Faust, 453,) it is provided that if the subscribing witness to a bond or note, shall fail to attend, the trial shall not be postponed, but the signature to such bond or note may be proved by other testimony, unless the defendant, at the time of filing his or her plea, shall swear that the signature is not his or hers. And in the case of *Edgar vs. Brown*, (4 M'C. 91,) it was decided that where no oath is made, it is enough to prove the hand writing of the obligor, without proof of the signature of the subscribing witness. If the oath be made,

however, there can be no doubt but that the plaintiff must produce the subscribing witness, if he be within the jurisdiction, or if he be dead or out of the jurisdiction, must prove his hand writing, as at common law. The Act, in its terms, was evidently intended to apply to the courts of law. No *plea* is filed when a note is produced in accounting before the commissioner. Yet, perhaps, as in the instance of the Statute of Limitations, this court ought to conform to its spirit. In the case of executors and administrators, the Act provides that the signature may be proved, unless one of the executors or administrators, at the time of filing his plea, shall swear that he has cause to believe that the signature is not his testator's, or intestate's.

The note, in this case, was not mentioned in the bill or answer, and the executor could not have made the oath until it was produced upon the reference. In conforming to the spirit of the Act, perhaps, the regular course would have been that the executor should then have made the oath, and required the production of the subscribing witness, or proof of his signature. But this has not been usual, and we think it within the discretion of the Court to allow him to make the oath before granting the issue which is desired. The issue will be granted upon that condition. It must be recollected, too, that the bill was sworn to, and purports to set out all the claims of defendant to complainant; and the answer, which sets out all the other claims, is silent as to this. This is, of itself, a suspicious circumstance.

It is true, that in the course of the argument there was an admission, or rather, conjecture, that the signature was, in fact, written by the witness, William Stogner, at a subsequent time, and that he was the forger of the instrument. But it is hardly necessary to say that this was not such an admission as would establish its authenticity, or make it evidence.

The argument in the Court below, seems to have turned on the proof of the hand writing of the obligor, McCorkle. But that of the subscribing witness was in question before the commissioner, and evidence was given in relation to it. It was involved in the terms of the exception to the report and of the grounds of appeal to this Court, and therefore, seems proper to be considered. But if it were only necessary to prove the hand writing of the obligor, the fact that there appears to have been a subscribing witness, and that the witnesses examined state that the signature was not his hand writing at the time, is enough to throw suspicion upon the other proof. To say that it was not his hand writing at the time the note bears date, (which we must presume to be the true date) is to infer that he did not subscribe it, as a witness, and that *his signature*, at least, is forged or spurious. The proof of hand writing by witnesses, or comparison of hands, affords much room for mistake and uncertainty, and such a circumstance is calculated to throw doubt upon it, however satisfactory it might otherwise be. As I have said, the granting of an issue, is a matter within the discretion of the Court, and where serious doubt exists, it ought to exercise that discretion.

It is therefore ordered, that upon the complainant's making the oath required by the Act of Assembly aforesaid, an issue at law be made up, to try and determine whether the complainant's testator, Samuel McCorkle, did make and execute the note or obligation in question, to the next sitting of the Court of Common Pleas for Lancaster District: Defendant to be the actor at law: costs of the issue to abide the event.

DUNKIN, Ch. concurred.

JOHNSTON, Ch. I do not concur in the doctrines of this opinion, and am not dissatisfied with the decision of the Chancellor and Commissioner; but I acquiesce in the order for an issue.

Clinton, for the motion.

*G. L. Massey, administrator de bonis non of Wm. Massey,
vs. Thos. K. Cureton, executor of Henry Massey.*

At an administrator's sale, the notes, of a firm then in good credit, were taken without security. The administrators were responsible for loss by the the subsequent insolvency of the firm.

One of two administrators took the principal management of a sale, and, although advised against it by the other, took notes of a certain firm without security; the other acquiescing without further opposition. On these, with other circumstances, the first was held, alone, liable for the loss occasioned by his imprudence.

Heard before Ch. JOHNSON, at Lancaster, July, 1839. The details of the case are given, at length, in the following circuit decree:

William Massey died intestate, and in 1836, administration of his estate was granted to Henry Massey, defendant's testator, and Thomas C. Massey, both of whom have since departed this life. The defendant was nominated executor of the last will of Henry Massey, and took upon himself the administration of his estate, and the complainant was appoint-

ed administrator of the estate of Thomas C. Massey, who died intestate, and administration *de bonis non* of Wm. Massey, and the guardianship of his minor children, was granted to the complainant.

In December, 1836, Henry and Thomas C. in the course of their administration of the estate of Wm. Massey, sold his personal estate, under an order of the Ordinary, on a credit. At this sale one Joseph Clark, acting as the agent of Jacques Bishop, or of Jacques Bishop and Wm. Bowen, trading under the firm of Bishop & Bowen, and under a written authority, purchased two negroes, at \$2,127, and they were delivered to him, on his giving a note for the amount, signed by Bowen, as the agent of Bishop, without any further security. Bishop, and Bishop & Bowen, and Clark, are now wholly insolvent and the debt is lost to the estate; and the bill charges that it is in consequence of the negligence of defendant's testator, who assumed the entire control and management of the estate; first, in not requiring the security of bond and personal surety, which were the terms of the sale; and second, in not using due diligence in collecting the debt before the insolvency of Bishop & Bowen; and the question is, whether there has been such want of diligence as to charge the administrators, and if so, whether one or both.

Mr. Solicitor *Withers*, examined on the part of complainant, stated, that at the time of the sale, Bishop was in the possession of a very large estate, and his credit was unlimited; but that in the fall of 1837, circumstances came to his knowledge, connected with his professional relations with him, which led him to suspect he was much embarrassed; that his insolvency was not generally suspected until February, 1838. He is now hopelessly insolvent.

Benjamin S. Massey, was present at the sale of the negroes. Thomas C. submitted to him the letter of credit under which Clark purchased the negroes, and consulted him as to the pro-

priety of suffering Clark to purchase under it. Henry was present at this transaction. Witness advised against it, and gave as a reason that he had lately met John Robinson, of Charleston, at Camden, who told him that he had come there to wind up the affairs of John M. Niolon & Co., of which Bishop was a member, and that they must fail. Thos. C. was disposed to act upon this advice, but Henry said that he thought Bishop was good, and it would promote the sale to allow Clark to bid; dont know that Thomas C. opposed any further opposition to it. At the sales Thomas C. superintended the biddings, and Henry set down the sales and took the notes of the purchasers. Henry was older than Thomas C., possessed more intelligence and understood business better, and witness advised Thos. C. not to concern with the pecuniary affairs of the estate, and he believes he acted on this advice. Henry kept possession of the papers of the estate, and appeared most active in the administration. Henry died 1st April, 1837, and the defendant turned over to Thomas C. all the papers of the estate which had been in his possession, and advised him to attend to the debt due from Bishop.

James B. Cureton was present at the sale. The authority under which Clark was to bid was shewn him by Henry—thinks it was signed Bishop & Bowen, and not Bishop per Bowen. He advised him not to have any thing to do with it, as he thought the whole concern a rotten one. The public opinion was that Bishop was good, and witness would, probably, have trusted him for the value of the negroes, but he thought they had too many irons in the fire. Within a month or six weeks after the sale, Clark and Bowen sold the negroes to witness to raise cash, and he gave them his note, payable at ten days, for the amount. On the same day he sent a message by Joseph Massey, to one or both the administrators, in which he communicated to them his suspicions with regard to

the state of the affairs of Bishop & Bowen, and advised them to endeavor to secure themselves, and if they would come down, he thought they might, possibly, get his note in payment.

Elijah Morris testified that Henry told him he had received Mr. Cureton's message, but too late to act upon it. This witness heard other persons express to Henry their doubts as to the security of this debt, but he thought it perfectly secure. This witness saw Thos. C. pay to Henry some money which belonged to the estate. Henry told him at the time, that he wanted him to pay a debt due by the estate, to Hood, and returned him money for that purpose, or Henry retained it out of the amount, and witness don't know which. Another witness, Benjamin H. Massey, speaking of the same transaction, says that Thomas C. turned over to Henry all the funds in his hands, and that Henry returned him \$200, to pay Hood's debt.

Mr. *Witherspoon*, the ordinary, testified that Henry was older than Thomas C., and in all other respects better qualified to conduct the administration of the estate. He regarded Thomas C's. appointment as merely nominal. He gave himself but little concern about the administration.

This sale is stated in the bill to have been made under an order from the Ordinary, but that was not produced, and I am, of course, ignorant of its contents, but every one knows that the general, if not universal practice, is, to prescribe, as part of the terms of sale, that the administrator shall take notes or bonds from the purchasers with sufficient personal security. Such are stated in the bill to have been the terms in this order, and I should hazard little in assuming that such was the tenor of the order under which this sale was made; and, if such was the fact, there can be no doubt that the neglect to take the security was such a want of diligence, on the part of the

administrators, as to render them liable. *Stukes vs. Collins*, (4 Eq. Rep. 207.)

In the absence of any such order, and taking it for granted that the administrators acted, in this matter, upon their own judgment and discretion, the question of diligence must depend on the usages of the country, upon what prudent men would do under similar circumstances; and I think the complainant might safely rest the case upon the issue, whether there has ever been an executor's or administrator's sale, where security was not one of the conditions. In a long experience, even where administrators were entitled to sell the personal estate, without the order of the ordinary, I have never heard of one. There are other circumstances in the case. It is true that Bishop was in possession of a large estate, and his credit good, but suspicions about this time began to be entertained about his solvency, and these were communicated to the administrators by B. S. Massey and Jno. B. Cureton, both men of intelligence and character, and as likely to be well informed and to arrive at a sound conclusion as any in the community: so that the administrators were not only culpable on the general principle, but for their disregard to these admonitions. There have been cases in which security has been dispensed with as to particular individual purchasers, notwithstanding that was one of the conditions of the sale, and some have fallen within my own observation, but these were a departure from the general usage and cannot form a rule.

The administration here, was joint, and, of course, as between the complainant and the administrators, they were both equally liable, but as between themselves there can be as little doubt that each is responsible for his own negligence. *Knox vs. Pickett*, (4 Eq. Rep. 92--3.)

Now, all the evidence upon the question, and there was no contrariety, went to shew that Henry Massey assumed the entire control of the pecuniary affairs of the estate, and in the

particular instance, Thomas C. on the advice of Benjamin S. Massey, was disinclined to accept Clark's bid on the credit of Bishop, in which he was overruled by Henry, and if he was disposed to take the risk, Thos. C. was not bound to quarrel with him about it.

The bill also further states, that according to the statement of the accounts of the administration, by the ordinary, there is about \$375 90, unaccounted for, but whether the devastavit was committed by Henry or Thomas C. the complainant is ignorant. No evidence was offered on this allegation, and it is, perhaps, a proper subject of mutual accounting between the parties before the commissioner, and an order will be made for that purpose.

It is therefore ordered and decreed, that the commissioner do ascertain and report the amount of the sales to Joseph Clark, as the agent of Bishop, with the interest thereon; that the defendant do pay the complainant the amount thereof out of the assets of the estate of his testator, if there is so much in his hands to be administered. And, it is also decreed, that the defendant do account for his testator's administration of the estate of Wm. Massey, deceased, and that complainant do likewise account for his intestate's administration of that estate, and that the commissioner do report whether there is any devastavit of the estate of the said Wm. Massey, and by which of the administrators the same was committed.

In addition to the evidence incorporated by the Chancellor, in his decree, the following is extracted from his notes of the testimony :

T. J. Withers, ex. for complainant. There is no security on the notes signed by Bowen, as agent for Bishop, for the price of the negroes, dated 1 Dec. 1837.

Benjamin S. Massey, after detailing his conversation with administrators, and his advice against allowing Clark to pur-

chase, adds, "does not know what transpired between them afterwards, but Clark bought the negroes—did not see any opposition to this sale on the part of Thos. C."

Elijah Morris, in addition to so much of his testimony as appears in the decree, says, "understood that Thos. C. had gone in pursuit of Bowen to get his note and security; when he returned he told complainant (witness, probably,) that Bowen told him that he could pay him the money, but he wanted it for some other purpose, and that he had offered him accounts on persons up here to pay the debt, but he declined taking them."

B. S. Massey. Thos. C. told witness, that Bowen offered him accounts, in payment, but he declined taking the trouble of collecting them; that the people in Camden thought his note good.

Receipt from Thos. C. Massey, to defendant, as executor of Henry Massey, of all the property of the estate of William Massey, 17 April, 1837. B. Clark's account for the purchase of the negroes is on the list.

The defendant appealed, on the ground that both administrators ought to have been held equally responsible.

Curia, per JOHNSON, Ch. The Court concur in the judgment of the Circuit Court. Some errors in the statement of the facts have, however, found their way into the decree, and although they are not regarded as affecting the merits in the least, it is thought proper to correct them here.

The order of the ordinary, for the sale of the estate of Wm. Massey, complainant's intestate, has been produced here; and seems to have been filed as an exhibit in the cause, but was not brought to the view of the Circuit Court. The terms prescribed are, that cash should be paid for all sums under five dollars; for all sums over that, and not exceeding \$1000, twelve

months credit; and two years credit for all sums exceeding that amount; and, as supposed in the decree, the purchasers were required to give *bond and good security*.

It is assumed by the decree, that at the time Clark purchased the negroes, he gave the administrators a note for the amount, signed by Bishop, or Bishop & Bowen; but, on further examination of the evidence and from the explanations of council here, I am satisfied that no note at all was given at the time, and that the only evidence of the debt was the written authority given by Bishop or Bishop & Bowen to Clark, to purchase, and the entry in bill of sales. The note which led to the mistake was obtained by Thomas C. Massey from Bowen, in December, 1837.

The argument founded on the supposed negligence of Thomas C. Massey in not securing this debt, after the death of Henry Massey, has been renewed here, but it will be seen, by recurring to the facts before stated, that according to the terms of the sale the debt did not become due until December, 1838, long after the affairs of Bishop & Bowen had become notoriously desperate. Thomas C. Massey had, therefore, no means of coercing the payment and compelling them to give security. That he could, by diligence and address, have prevailed on men in their condition to pay so large an amount a year in advance, would scarcely furnish the grounds of a plausible argument that he was negligent, nor do I think he was under any legal or moral obligation to accept, even as a collateral security, notes and accounts scattered over the country, to relieve his co-administrator from the liability he had incurred by his negligence.

Appeal dismissed.

HARPER, JOHNSTON and DUNKIN, Ch., concurred.

Withers, for the motion.

Thomas J. Kerr vs. The Camden Steam Boat Company.

The Court of Equity has jurisdiction in the case of "an agent entrusted with funds of his principal, and having received other funds in the course of the agency, for which he is accountable, and who comes to render his account and have it allowed and himself discharged from his trust, and if any balance be due him, that, in the administration of complete justice, it be decreed him;" though it appear that the party is not without a remedy at law.

"Where there is a continuing agency, and it is the business of the agent to disburse money to third persons on account of his principal, a bill will lie for or against such principal." [*Harper, Ch.*]

It seems that mere complexity of accounts between parties, would give jurisdiction in Equity; but *quære*,—where the items of demand are all on one side.

Heard before JOHNSTON, Ch., at Kershaw, June 1840, who delivered the following decree:

The only question presented, relates to the jurisdiction of the Court over the case made by the bill.

The bill states that the defendants, having contracted for a steam-boat, did, on the 22d April, 1836, through a committee, enter into an agreement with the plaintiff, signed by both parties, in the following words: "This agreement, made by C. Matheson and J. M. DeSaussure, as a committee of the Camden and Charleston Steam Boat Company, and T. J. Kerr, witnesseth:

"That we empower and authorize T. J. Kerr to make contracts for an engine, joiner's work, painter's work, anchors, cables, and every thing complete to finish a steam boat now contracted for with Mr. Poyas; and also authorize him to finish and equip said boat in proper order for running, subject to the direction of said company or their committee. Said Kerr to go to the North and make all contracts on the most favorable terms, and to give every possible despatch and execution to the said business. For which duty, we agree to pay him 2½ per cent. commissions on the amount of said contracts

and payments by him; also, a proportionate part of his expenses to the North."

That in the faithful execution of his engagements, the plaintiff proceeded to Baltimore and contracted for the engine for said boat, and returning to Charleston, where the agreement was entered into and where he resided, made the other contracts stipulated on his part, and attended to the completion and equipment of the said boat, so that she was fully equipped and furnished on her first trip from Charleston to Camden. That, to expedite the completion of said boat, the plaintiff, during the progress of the work and after the boat was completed, advanced, at different times, various sums of money, exceeding the sums furnished him by the defendants for that purpose, and the bill refers to an accompanying exhibit marked A, for a statement of the sums received by the plaintiff on account of the defendants, and his expenditures and charges against them, leaving a balance in favor of the plaintiff of \$2,560 03.

The bill further states, that after the boat was completed, the plaintiff was employed, by the defendants, as their agent to collect freights, furnish supplies, make contracts, and charters of affreightment for her; and that, in his said capacity as agent, he, at various times, received divers sums of money and made many disbursements to very considerable amounts, all of which are stated in exhibit B, shewing a balance of \$548 06, due him. That he has requested defendants to account with him touching their mutual dealing, and in order thereto, has rendered his accounts to them, from time to time, with a request that they would pay him the balance claimed by him, or such balance, as upon a fair statement of the accounts, he might be found entitled to; but that they have refused to accede to his requisitions, under various false pretences; and, among others, that the contracts made by him for work and supplies were extravagant, and that he had let the boat, for a trip, or trips, to

Florida, at a grossly inadequate rate. Besides which, the defendants insisted that his accounts were not properly vouched; whereas the bill charges that the plaintiff has exhibited vouchers for every item usually vouched, and that he is prepared with vouchers for every item, except, perhaps, some items of small amount paid in petty sums, at different times, and in such a manner as precluded his taking receipts.

The defendants, in their answer, admit the contract of the 22d April, 1836, as stated in the bill, but do not admit the charges and expenditures of the plaintiff, as set forth in the bill and exhibit A, in relation thereto. They also admit the employment of the plaintiff as agent of the boat after her completion, but contest the charges and expenditures, to which he lays claim as such agent, and set forth in exhibit B. They particularly object that his contracts and expenditures set forth in the exhibits were grossly exorbitant, and that in relation to the services of the boat in Florida, the plaintiff has not allowed them, in his account rendered, credit for the fair hire of the boat entrusted to his care and control.

Finally, the defendants plead to the jurisdiction of this Court, upon the case stated in the bill, and insist that the plaintiff has plain and adequate remedy at law. The case has been argued upon the sufficiency of this plea.

It is not doubted that the plea has been put in and the objection to the jurisdiction taken at the earliest time possible; nor that it is competent for the defendant to answer and plead to the jurisdiction at the same time. Neither is there any objection to the form of the plea. The question, then, is whether the court has cognizance of the case. The Act of 1791, provides "that suits in Equity shall not be sustained in any case where plain and adequate remedy can be had at Common Law;" and it has been argued that, if it be true that the plaintiff can recover his demands at law, although this Court might have had a concurrent jurisdiction before the passage

of this statute, the obvious import of the statute is to forbid this Court, after its enactment, to exercise this jurisdiction; and to command it to leave cases of concurrent jurisdiction exclusively to the cognizance of the Law Court. Such would have been my own construction of the Act, had it not so long and so uniformly received the interpretation that it is merely declaratory of the ancient and established doctrine, that Equity will not interfere, unless it can grant a more certain, a more convenient, or a more complete relief; and that it was not intended to withdraw any matter from the Court, of which, at the passing of the Act it had jurisdiction. We are then to inquire whether this Court, according to established precedents, can take jurisdiction in this case.

It is not doubted that the plaintiff may, by recognized process, bring this company before a Law Court. It is not pretended in the bill, that he needs any discovery from the defendants. He has sought none, and has obtained none. He professes to be prepared with proof of his demands against the defendants.

No fraud is charged on the defendants, nor is any accident alleged calculated to impede the plaintiff's recovery. If there is any trust in the case, it lies with the plaintiff, and not with the defendants. As agent, he is liable to account to them for the funds received from them, or on their account, in the course of his employment. His demands against them are merely legal demands, or debts for such and such services, as for monies expended to their use. As he has evidence to establish these, as a jury is competent to decide on that evidence, and as a Law Court can give him a judgment according to the verdict, it is not perceived how it can with truth be asserted that he has not a remedy both plain and adequate.

Yet, it has always been asserted that, when accounts are long and complicated, when there are mutual accounts running for a long time, or consisting of a great number of items

of various character, or where one of the parties is a trustee for the other, chargeable and accountable for funds received, and seeks to discharge himself, in whole or in part, or even to claim an excess in his favor, Equity affords a relief far more convenient than Law. Although the books and cases are full of dicta to this effect, no precedent has been pointed out, of a jurisdiction assumed here, merely on the score of the length or complication of demands entirely legal in their nature: nor where such jurisdiction has been asserted merely because there are demands on both sides.

If the plaintiff can claim this jurisdiction, it must be on the ground of his being an agent, entrusted with funds by his principal, and having received other funds in the course of his agency, for which he is accountable; and, that he comes here to render his account, and have it allowed, and himself discharged from his trust, and if any balance be due him, that, in the administration of complete justice, it be decreed him.

It will not do to put this case on any other ground; otherwise, the boundaries of jurisdiction will be broken down, at great public inconvenience, and there will be nothing to prevent this forum from being flooded with every species of legal demands.

But, I think, the jurisdiction may be safely put, and well maintained, on the ground of trust and agency. No doubt has been expressed of the right of an executor, guardian, or any other trustee, to claim a settlement in this tribunal. A steward or bailiff may do so. Is there any principle which will discriminate between such agents and the one before the Court?

The only case relied on by the defendants' counsel is that of *Dinwiddie vs. Bailey*, (6 Ves. 136.) That was a case where an action at law had been brought, by a principal, against his agent, for money alledged to be due by the agent. The agent had counter demands; but, instead of setting them

off at law, he filed a bill full of obscure statements, praying that the principal should be enjoined at Law and compelled to meet him in Equity. The bill was dismissed. The principal had gone into a jurisdiction unquestionably concurrent, and which, having cognizance of the case, was not to be superceded by another, which was only concurrent. The defendant at Law was bound to meet the case in the Court where it was brought, and where, according to the opinion of the Chancellor, there was no difficulty in obtaining all the remedy to which the statements, in his bill, entitled him. The Lord Chancellor ruled, therefore, that the case must be disposed of altogether at Law, where it was begun; observing that it would be another question whether this jurisdiction might not attach upon it; evidently meaning whether it might not have attached but for the possession of it by the Law Court.

It is ordered, that the plea to the jurisdiction be overruled, and the accounts be referred to the commissioner.

The complainant appealed on the ground, that the Court of Equity had no jurisdiction of the case made in the bill.

Curia, per HARPER, Ch. Though it may not be easy to define, by, a general rule, the class of cases in which a bill will lie for an account, yet, I think, there can be no doubt with respect to the present one. That an equitable jurisdiction exists in cases of complex and intricate accounts, between whatever parties, though an action might be maintained at law, and though no discovery be needed, the authorities have settled, beyond question. Such is the conclusion of Justice Story, whose work was cited in argument. (1 Sto. Eq. 433, §451. See, also, Mift. Pl. 96, and *O'Connor vs. Spright*, 1 Sch. & Lef. 309.) It is true that, in some cases, it is said that there must be a series of mutual demands; not merely demands on one side and payments on the other. Yet, this

is to be taken with some qualification, for, in the case of *The Corporation of Carlisle vs. Wilson*, (13 Ves. 276,) though the demands were all on one side, and all of them admitted to be of a legal nature, yet the bill was held to lie. The question always is, whether there be an adequate remedy at law?

The case stands on a different footing, when there is a relation of privity between the parties, such as that of bailiff, receiver, agent, or steward. It is said by Justice Story, and was quoted in argument, that if the account is all on one side, and no discovery be needed, the bill will not lie. But, if the bill is against a person standing in such a relation of privity, it is always taken for granted, that a discovery is needed. It is said in *McKenzie vs. Johnston*, (4 Madd. 375,) that wherever the relation of agent exists, the bill will lie for an account. The party is entitled to discovery, and to have the account set out. It was where such a relation of privity existed, that the action of account lay at common law. (1 Bac. Ab. Tit. Accompt.) And is it questioned, but that the proceeding in Equity has superceded the action of account? For the circumstances which rendered that action an inadequate remedy, see 1 Sto. Eq. 426, *et seq*; Jer. Eq. Jur. 504. A separate issue was sent by the auditor, to be tried upon every contested item.

But though a bill will lie against such an agent, upon a supposition that discovery is needed, will it lie in his favor, when he is not supposed to need any discovery? I know of no instance, within the Chancery jurisdiction, in which there is not a mutuality of remedy. A specific performance of a contract for the purchase of land is enforced in favor of the purchaser, because he is supposed to want the thing in specie. The vendor is also allowed to enforce it though there is no such reason, and he has plain and adequate remedy at law. It is a matter of familiar practice, that an executor comes into Court, to settle his accounts, and to be reimbursed, if he has advanced more than the parties were entitled to; though he

needs no discovery, and might recover, at law, money paid by mistake. It is not doubted, but that the action of account lay, in favor of either party, that the balance on either side might be ascertained. A party may come to have an account allowed. (2 Caines. Ca. 1, 3, 52, 53.)

When it is said that there is plain and adequate remedy at law, in this case, I do not suppose the action of account to be meant, which has so often been decided not to afford an adequate remedy. Let us examine the adequacy of the remedy in an action of assumpsit. In Chancery, the practice is, that the accounting party "discharges himself by his affidavit, *without* voucher, when the amount of the item is under 40s. and by his affidavit, *with* the production of the voucher, when the demand is above 40 shillings, if no objection be taken. If any party objects, the person must be examined to whom the money was paid; if this cannot be done, the signature to the voucher must be proved." *Bingham vs. Clanmorris*, (12 Eng. C. C. R. 12.) If an objection be taken before the master, time is allowed to procure the necessary proof, and if the objection be captiously and unnecessarily taken, the party may be made responsible in costs.

Very different is the case where the party comes before a jury. Here he must be prepared to prove by witnesses every charge that he has made, even to the smallest item of personal expenditure. Here is an account, containing some hundreds of items, of money disbursed to a great number of individuals, many of them residing in other states. Preparatory to trial, it will be necessary to send commissions to prove the payments to these last, at an enormous expense. All witnesses within the jurisdiction of the Court must be summoned personally. From their great number, it is not probable that all could ever attend at one time, and the plaintiff must either be indefinitely hung up, or submit to lose a portion of his demand. Once before the jury, there can be no time al-

lowed to supply any deficiency of proof. It is not necessary that the defendant should object. He has only to be silent, and the plaintiff must produce his proof. The vouchers are signed in a great variety of hand writings, and there is no reason for supposing that the plaintiff will be able to find a single witness capable of proving more than one of them. There would be a different abuse from that which has existed in the action of account. There might be fifty contested issues to be tried under one. The answer of the defendant suggests several issues, which probably would be greatly litigated. It would be a mockery of justice and of the complainant to say that he has an adequate remedy at law. It is on such reasons that Lord Ridesdale says, (Milf. Pl. 96,) that "though accounts may be taken before auditors in a Court of Common Law: yet, a Court of Equity, by its modes of proceeding, is enabled to investigate, more effectually, long and intricate accounts in an adverse way, and to compel payment of the balance, which ever way it turns." Such reasons governed in the case of *The Corporation of Carlisle vs. Wilson*. That was a bill to have an account of tolls which the defendant had become liable to pay for the last six years, by carrying goods through the streets of Carlisle. It was admitted that *indebitatus assumpsit* would lie, but, the Chancellor said, "how can a case of this kind be tried at the assizes; an account to be surcharged, upon which every inhabitant of Carlisle might be examined."

This is very different from the case of a merchant, or even factor, who, by proving his own book, or, probably by the testimony of one or two clerks, might be able to prove his whole case. I do not mean to say, though some of the cases express it very generally, that a bill will lie against every agent, if only to do a single act, or it appears that no account is necessary. It is not practicable, however desirable, to draw, with perfect precision, the line of ju-

risdiction. But, I am prepared to say, that where there is a continuing agency, and it is the business of the agent to disburse money to third persons, on account of his principal, a bill will lie for or against such agent. Such, I understand to be the case of the bailiff, receiver, or steward, and there is no reason applying to them, which will not apply with equal force in the present case. I think the decree should be affirmed.

JOHNSON, Ch., concurred.

JOHNSTON, Ch. I am by no means sure that, in my habitual cautiousness not to assume a doubtful jurisdiction for this Court, I did not express myself too strongly against the plaintiff's case, upon some of the grounds taken by his counsel. Certainly there are cases in which, from the very complexity of the accounts to be examined, Courts of Law are incapable of doing competent justice. The case of *White vs. Williams*, (8 Ves. 193,) was upon a bill by an heir and devisee of his father, against trustees under a conveyance of estates by the father; in which the plaintiff prayed an account of the administration of the trusts, and claimed a re-conveyance upon its appearing that they were fully satisfied. Now, suppose that in such a case, instead of having an equitable right to a re-conveyance, the plaintiff had had a purely legal right, dependant upon the administration of the trustees, is it not manifest that a Court of Law could not have entered into the enquiry necessary to determine whether that right had, or had not occurred?

In *O'Connor vs. Speight*, (1 Sch. & Lef. 305,) the defendant had, in 1780, demised certain premises to the plaintiff for three lives, at 20 shillings an acre, for every acre the premises might contain. The plaintiff entered, although the number of acres was not ascertained; and for sixteen years, was in the

constant habit of accepting the defendant's bills, paying money to his order, selling him goods on credit, and supplying him and his family with money; but, no regular payment of rent, *eo nomine*, appeared to have been made; nor had the defendant given him any receipts in full for precise *gales*, (an Irish expression for stated payments.) The defendant having brought ejectment for non-payment of rent, the plaintiff filed his bill for an account, on the foot of the dealings between them, and that a balance claimed by him, after deducting the rent, might be allowed him; and praying an injunction against the ejectment. The Lord Chancellor, Ridesdale, maintained the jurisdiction, upon the ground that, although the mutual demands were legal, the account was complicated; and that a Court of Law was incompetent to examine it, at *nisi prius*, with the accuracy necessary to determine whether a balance was due the plaintiff.

I do not quote this case with a view to put the one before us upon the ground of complicated accounts, in which the Court has a discretion to act, (13 Ves. 279;) but to exclude the conclusion that, in a case clearly of that kind, I would hesitate to exercise the jurisdiction of this Court. It was the less necessary to look into the character of the accounts in this case, because, as I conceived, there was another ground upon which the jurisdiction might be confidently rested; and I still retain that opinion.

Professor Story, in his Commentary on Equity Jurisprudence, (1 Story, chap. 4, p. 93,) tracing the concurrent jurisdiction of this Court, assigns, as one of its sources, the inability of Courts of Law, in some instances, to give perfect relief; which occurs, says he, "in all cases, when a simple judgment for the plaintiff or for the defendant does not meet the full merits and exigencies of the case, but a variety of adjustments, limitations and cross claims are to be introduced and finally acted on, and a decree, meeting all the circumstances

of the particular case between the very parties, is indispensable to complete distributive justice."

The plaintiff's case comes, I think, clearly within this principle.

Admitting that he might have sued at Law upon his side of the account, would that have given him "adequate relief," in the case he has stated? The defendants might have kept suspended over him an indefinite liability for his administration of the trust they had committed to him. Complete justice entitled him to the balance, if any, which was due him, clear of all further accountability. As the defendants might have called him to account here, as their trustee, I think that, even if he claimed no balance, he had a right to call them in to render his account to them, and to be discharged. I think it not doubtful that between trustee and *cestuyque* trust, the right is mutual; that wherever, for instance, an executor or other trustee may be called to account, he has a right to come forward and terminate his responsibility by rendering his account and having it allowed. And if this be so, much more is the trustee entitled to the jurisdiction, to set off what may be found against him and recover a balance due him. I put this case upon that ground; and go no further. The decree is affirmed.

DUNKIN, Ch., (dissenting.) In Mr. Justice Story's Treatise on Equity Jurisdiction, (1 vol. p. 442,) it is said that the most important agencies falling under the cognizance of Courts of Equity, are those of attorneys, factors, bailiffs, consignees, receivers and stewards. It is further stated, that in most agencies of this sort, "it rarely happens that the principal is able, in cases of controversy, to ascertain his rights, or to ascertain the true state of the accounts, without resorting to a discovery from the agent;" and that, independent of the discovery, in most agencies of long continuance, "the re-

medy of the principal would be utterly nugatory, or grossly defective."

In a note to the same page it is stated, on authority, "that, in general, a bill will not lie by an agent against his principal, for an account, unless some special ground is laid; as incapacity to get proof except by discovery." The case of stewards is adverted to, as an exception, because a discovery from his principal is ordinarily necessary. "The nature of this dealing is that money is paid in confidence, without vouchers, embracing a great variety of accounts with the tenants; and nine times out of ten, it is impossible that justice can be done to the steward, without going into Equity for an account against his principal." In order to obtain, I suppose, a discovery or admission of "the sums which had been paid to him in confidence without vouchers." For sums paid to any other person, without voucher, might be proved in the ordinary way. Unless this be the ground of exception, every factor, attorney, or even agent for a single transaction, might file his bill in this Court, as is done in this case, for a balance alleged to be due him by his principal. In *Scott vs. Truman*, (Willes, 405,) the Chief Justice had placed the jurisdiction of the Court of Equity, in case of a principal, against his factor, on the notion of a trust. But Mr. Justice Story remarks, that if the source of jurisdiction in such cases, (a consignment to a factor for sale) were the mere notion of a virtual trust, Equity jurisdiction would cover every case of bailment. "But," he adds, "it is the necessity of reaching the facts, by a discovery; and, having jurisdiction for such purpose, the Court, to avoid multiplicity of suits, will proceed to administer the proper relief." (2 Story, 445.)

In the case under consideration no discovery is sought from the defendants. All the facts are within the knowledge of the complainant; and, in respect to the sums disbursed by him, he charges expressly (in the language of the bill,) that "for every

item usually vouched, he has shewn vouchers, although some items of small amounts paid out in petty sums, at different times, and in such a manner as to preclude him from taking receipts may be found without voucher to sustain them." As to these petty sums, it is not perceived that the complainant would be entitled to any advantage before the commissioner, which he would not have with a jury. But, this difficulty of proof is not urged in the bill as a ground for the interference of this Court; nor could it, in my judgment, sustain the jurisdiction, unless discovery were sought.

But the objections to the complainant's account, are stated in the bill, and substantially admitted by the answer, to wit: that he paid extravagantly for completing the boat, and that he chartered her for too small a sum on the expedition to Florida; these are the points on which the parties are at issue. For the examination and decision of this issue, it seems to me that the ordinary tribunal is the appropriate forum. I am of opinion that the plea to the jurisdiction should have been sustained.

Ex parte Hanks, in the matter of J. McDonald and wife vs. T. Williams and E. Durant, adm'rs of Joseph Durant.

A claim preferred against administrators, for large sums alleged to have been advanced to their intestate, was rejected by the Court, on the ground of the claimant's probable inability to advance such amounts, the staleness of the demand, and other strong circumstances of suspicion, although sustained by absolute and unimpeached vouchers.

Where a sheriff's deputy or clerk has paid out money, on executions, it will be presumed, without proof, to have been from funds officially received by him for that purpose, and not to have been advanced from his private funds.

Where a party, less than four years after his demand had accrued, preferred it in the form of an answer to complainant's bill, and complainants afterwards dismissed their bill, and defendant, then, immediately prosecuted his claim, but in the mean time the statutory limit had expired; *Held* that it was barred by the Statute of Limitations.

Heard, at Sumterville, first, before Ch. JOHNSTON, in January 1839; afterwards, in January 1840, before DUNKIN, Ch., who delivered the following decree:

This case was presented to the Court on exceptions to the commissioner's report, but in order to understand either the exceptions or the decision of the Court, a brief statement of facts is necessary.

Joseph Durant became Sheriff of Sumter District, in February 1824. John Hanks, the petitioner, was appointed his deputy on 9th February. He was to assist in the transaction of the office business, and receive an annual salary of \$300, and his board. According to the statement of his witness, James Watson, the petitioner attended to making settlements with persons, received and paid money and kept the books, and the witness did the out door business, directed by Durant and Hanks. Hanks kept a set of books; Durant had access to them and made settlements in them. In this manner business was conducted until Joseph Durant went out of office in February 1828; after that time, the petitioner was

employed by Joseph Durant, at a salary, as the petitioner alleges, of \$300, and his board, for the first year, and \$200, and his board, for every year thereafter. His duty appears to have been to attend to the business of Durant, as Sheriff, while he was in office, and afterwards, in the language of one of the witnesses, "to wind up the business of his office." He sometimes attended to some private affairs of Durant, but it appeared to the Court to be rather accidental, and not by virtue of any general agency. Joseph Durant died intestate, on 31st January 1831, and on 21st February 1831, letters of administration were granted to Thomas Williams and Elias Durant, who are defendants in the principal suit instituted by the distributees of Joseph Durant, for a settlement of his estate. On 11th November 1834, a bill was filed by the administrators of Joseph Durant, against the petitioner, John Hanks, for an account of the money received by him, as agent for the Sheriff, both before and after the expiration of his term of office. On 20th January 1835, the bill was taken pro confesso. On 14th September 1835, the answer was filed by consent. Among other things, it is there insisted, that the complainants have no right to require an account of his transactions, during the continuance of Joseph Durant's term of office, and prays that in this respect, the bill may be dismissed. For his subsequent transactions, the defendant avowed his readiness to account, as the Court might direct. The answer further alleges "that there is a large amount due him, by the representatives of the said Joseph, on account of the said Joseph, for his salary or wages, before referred to, and he prays that in adjusting his accounts the same may be allowed him, and that if, on a settlement, in this Honorable Court, the said Joseph is found indebted to him, he may have a decree for the same against the estate of the said Joseph, in the hands of the complainants." No account was filed with the answer. Two references were held; but, in March 1836, the office of Mr. Garden, the So-

licitor of the administrators, was consumed by fire, and with it were burnt the books of Durant, which had been deposited with him. Several references were subsequently held, but, before a report had been made, the complainants, on 20th September 1837, dismissed their bill. Prior to February term, 1836, the bill of the distributees of Joseph Durant, against the administrators, had been filed for a settlement and division of this estate. At that time an order was made for the creditors of Durant to establish their claims before the commissioner, and restraining their proceedings at law. On 5th January 1838, John Hanks filed a petition, stating the previous suit of the administrators against him, and craving the benefit of this order, and on 11th January, an order was entered, granting leave to the petitioner to present and prove his claim. On 7th August 1838, he filed his claim, on oath, before the commissioner, in which he alleges that the estate of Joseph Durant was then indebted to him, in a balance of three thousand six hundred and eighty-seven dollars and sixty-seven cents, exclusive of interest.

So far as the Court can understand from the papers, the claim, or rather claims, of the petitioner, may be classed under three distinct heads, viz: 1, payments made to individuals, on account of Durant, as Sheriff. 2d, payment of debts due by him, in his individual capacity. 3d, annual wages, from February 1824, to February 1831. The administrators interposed the plea of the Statute of Limitations. At January term, 1839, the commissioner reported a balance due to the petitioner of \$3,584 60. To this report several exceptions were filed. The report was not offered in evidence. The decree of the Chancellor overruled the plea of the Statute of Limitations—declared that Hanks must be presumed to have retained funds to pay his wages, during Durant's term of office, and that the commissioner erred, in rejecting "testimony tending to shew that Hanks' circumstances were such that

he could not, probably, advance large sums of money on Durant's account." On these, and other points, the report was re-committed. On the appeal from so much of this decree as related to Hanks' wages, during the official term of Durant, the cause was remanded to the Circuit Court, and an issue at law directed, which is yet pending.

At this time, (January 1840,) the commissioner reported a balance due to the petitioner, of \$3,456 62, with interest from 5th January 1838. He also reported, that from the testimony "it was not improbable for Hanks to have advanced such an amount for Durant, without having Durant's funds in his possession."

Several exceptions were filed by the administrators of Durant. It is proposed, in the first place, to notice the fourth exception, in connection with the report of the commissioner and the testimony. This exception takes issue with the conclusion of the commissioner as to the probability of the advancements of Hanks, on account of Durant.*

Hanks came to Sumterville, without any visible property, in 1819. He was first a deputy of Mr. Bradford, afterwards a clerk to Mr. John Haynesworth, and then a deputy of Mr. Capers. In February, 1824, he was employed, as has been said, by Joseph Durant, at a stated salary of \$300 per annum, and his board. It may be fairly inferred, that, until that time, he could have laid up little or nothing. If he then had property it appears to the Court that it would not have been difficult for him to have proved it, and that after the decree of the Court, in January, 1839, it was incumbent on him to have made the proof. From February, 1824, till February, 1828, he was in the exclusive employment of Joseph Durant. From the latter period, till the death of Joseph Durant, in January

*The rest of the exceptions had reference to minor points disconnected with the principal subject of the consideration of the Court.

1831, he was employed by Joseph and David Durant, at \$400 for the first year and \$300 afterwards.

It did not appear to the Court, from any testimony adduced, that during the time, from February, 1824 to January, 1831, Hanks had any mode of making money—any source of revenue, except his salary. It was not shewn, that he either trafficked, or speculated. His time and attention were exclusively and sedulously devoted to the business of his employer. His allegation is, that the whole amount of his wages from Joseph Durant, from February, 1824 to February, 1831, with annual interest thereon, is still due to him; and that, in addition thereto, he advanced, during that interval, for the payment of his employer's debts, official and individual, the sum of fifteen hundred and fifty-six dollars, 62½ cents; and, by the report, the claim has been allowed to him. But the administrators of Durant did not content themselves with creating a negative presumption. They attempted to shew, from circumstances, that the funds of the petitioner had been applied to other purposes. Until he went into the employment of Durant, it was sufficiently proved that he had no visible property. During Durant's term of office, he purchased a negro woman and one or two children. In the month after he went out of office he purchased two negroes for \$301, and paid the cash. He returns for the same year, a lot in the village of Sumterville, assessed at \$200; and, in January 1831, he purchased, for cash, another negro for \$485. In the following year, he returns to the tax collector, seven slaves. If these negroes and the lot of land were set down at an ordinary valuation, it would seem to be a sufficient representation of all that the petitioner could have saved, with very frugal habits, according to the witnesses. But the petitioner may have borrowed money to pay the debts of Joseph Durant—he may have purchased some of the slaves and the town lot on a credit, and is still indebted for these sums of money, and this leads to the enquiry whether

he could not, probably, advance large sums for the petitioner, when, under the petitioner's account." On these, and other facts, the proof in this re-committed. On the appeal from the lower court, that the account related to Hanks' wages, during the imprisonment of the petitioner, the cause was remanded to the lower court, "absolute vouchers and at law directed, which is yet proper in the circumstances ought not to be an invidious task, which a

At this time, (January 1831) the petitioner was inclined, nor justified, in un- balance due to the petitioner. He was inclined, nor justified, in un- 5th January 1838. He was inclined, nor justified, in un- inquiry into the pecuniary ability of ny "it was not improper to rely on such positive testimony in sup- an amount for Durant. But it is not to be denied, that as late as possession."

Several exceptions were taken to the claim now presented, Durant then rant. It is possible, (barely possible,) that he exception, that it is possible, (barely possible,) that he and the petitioner permit such a sum to remain in his hands, without re- clusior a settlement. But, in January 1831, Durant died, vanc as was admitted, an ample estate. An administration

1. The account between the petitioner and himself, is not cer- But, it cannot be doubted, that Hanks knew them ac- curately and intimately. It does not appear that, from the death of Durant, in January, 1831, until the filing of his an- swer, on 14th September, 1835, he ever presented a claim against the estate, or in any manner intimated to the admin- istrators, that he had a debt for which it was necessary to make provision. It is true, that ten months after the admin- istrators had filed a bill against him, and nearly five years af- ter Durant had been in his grave, he puts in an answer, in which he states, rather vaguely, that the estate is largely in- debted to him for wages, and if, on a settlement, the said Jo- seph should be found indebted, prays that he may have a de- cree for the same. This is neither the conduct, nor language of a man in limited circumstances, in reply to the unfounded

debtor, against whom he has had a plain, had for years forborne, not only to press, Durant, at his death, in 1831, owed sum, or any thing like it, it is impossible he would not have been aware of it. He had, means of establishing his demands; the same appears which he now produces. Why did he remain the administrators preferred their bill, in November, Why did he not, then, advance the claims which he sets forth? The Court has, in vain, attempted to resist the impression, that this demand was not conceived until the unfortunate result of the proceedings by the administrators revealed their defenceless condition and invited attack. It may be, however, that this inference is not warranted. It becomes proper then, to inquire into the character of those claims, which are now alone open to investigation, and which are submitted by the exceptions.

On looking into the account filed, the alleged advances seem to be (with inconsiderable exceptions.) for sums paid to suitors, on account of executions in the Sheriff's office. The business of Durant, and of Hanks, his deputy and agent, was to receive money from the defendants and pay it to the plaintiffs. During the year, after the expiration of his official term, the receipts and disbursements, in various cases and on various accounts, amount to about fourteen thousand dollars. It is said the deputy or agent paid large sums, more than ever received by him. Is it meant that the ex-sheriff received the money of suitors, which he misapplied, or that the deputy, by his authority, paid money to plaintiffs, which had not yet been received or collected from the defendants? This is not in the usual course of business, nor would it readily be supposed to exist. But these executions were lodged with Durant, while Sheriff. Within one month after his office expired, about four thousand dollars were paid by the petitioner, as his agent,

in winding up the business. The greater part of these sums were, almost necessarily, received by the officer, prior to the expiration of his term; yet, the petitioner, in his answer, resists, and, on the references, has hitherto successfully resisted any attempt, on the part of the administrators, to require an account of money received by him during the continuance of Durant's term of office.

But it appears to the Court, that the deputy or clerk of the Sheriff has no general authority to make advances for the Sheriff; and that, unless under special circumstances, this rule is the only practical check which the Sheriff possesses. When the deputy or clerk pays money, it must be presumed that he has received it, and that he pays, to the parties entitled, what has been received, or placed under his control for that purpose. It should not be required of the Sheriff, much less of his representatives, to *prove* that it has been paid to the deputy or agent. The fruitlessness of such an attempt cannot be better illustrated, than by reference to the general and indefinite character of some of the entries made in the account of the petitioner.

The sums alleged to have been paid for Joseph Durant, in his individual capacity, were comparatively trifling. Many of the general observations, in regard to the probability of advances by Hanks, are equally applicable to those items.

The report is recommitted.

The petitioner appealed from this decree on the ground taken in his exceptions. The executors of Durant, also, appealed from so much of the decree of 1839, as overruled their plea of the Statute of Limitations.

Curia, per DUNKIN, Ch. The Court are satisfied with the decree pronounced in January, 1840, and, in that respect, it might only be necessary to dismiss the appeal.

But the defendant has also appealed from so much of the decree of January, 1839, as overruled the plea of the Statute of Limitations. This plea was interposed, in bar, to the entire demand of the petitioner. Without enquiring whether the relation between the petitioner, (Hanks,) and the intestate, was of a fiduciary character, or whether it was a case of mutual accounts, within the statute, it may safely be assumed that, on the death of Durant, the fiduciary relation was determined, and the mutual accounts ceased. Durant died on 31st January, 1831. On 31st October, 1835, four years and nine months would have elapsed, and the statutory bar would be complete.

But, it is said that, on the 15th September, 1835, six weeks before the statute had run out, the petitioner, Hanks, filed his answer to a bill preferred in this Court by the administrators of Durant, and, on the reference, set up the account which is now demanded. The bill was subsequently dismissed, by the complainants, and this petition then filed. It is insisted that the answer suspended the operation of the statute.

Perhaps it might be sufficient to say that a party, insisting on an exception to the statute, ought to maintain his position by the terms of the law, by authority, or on some principle clearly analogous to the decided cases. No authority was adduced to the Court; nor would any such be probably found in the English books. According to the practice of the English Chancery, a complainant is not at liberty to dismiss his bill, but by leave of the Court; and that would not be granted where it would operate a manifest injustice to the defendant. Since the case of *Bethea vs. McKay*, decided at the late sittings in Charleston, (*Supra*, p. 93,) such would be probably the rule here. But it is a settled principle in England that "if the subject matter of the suit be of legal jurisdiction, the bringing of a suit in Equity will not bar the operation of the statute." Lord Loughborough, in *Pincke vs. Thornycrofte*, (1

Bro. Ch. R. 291,) says, "it was their own judgment that decided upon it. A legal bar has taken place in consequence of a legal provision;—whether that provision be wise or not, it must bar." The same principle had been recognized in *Pierce vs. Bellamy*, cited in *Eilbert vs. Emerson*, (2 Vern. 503,) where the Lord Keeper refused to direct that the Statute of Limitations should not be given in evidence. It does not appear that, in the case under consideration, any opposition was made to the dismissal of the complainant's bill; but, if it had been ineffectually made, the petitioner would be in no worse situation than a defendant at law, who has filed a discount, and whose demand may be barred by the statute, if the plaintiff discontinue his suit. In some cases, it may work great hardship; but this may always be prevented by a cross suit. As is said in the case cited, the party acts on his own judgment, and ought not to complain, if the Court declines to engraft a new exception on the Statute of Limitations. In the judgment of the Court, the plea should have been allowed; and for myself, I would add, in the language of Judge Nott, in *Vincent vs. Van Rhyn*, "I have seen but few cases where it appeared to me that the party was better entitled to such a shield."

It is ordered and decreed that the petition be dismissed.

HARPER, JOHNSTON, and JOHNSON, Ch., concurred.

Moses, for the petitioner.

DeSaussure & Garden, contra.

☞ This case was decided at May Term, 1839, but was accidentally omitted in the publication of the cases of that term.

James Dellet and Harriet his Wife vs. Benj. F. Whitner and W. W. Starke.

Under a power to sell land, but not to warrant the title, an agreement to make titles with a clause of warranty is not valid, or binding, even to the extent of the power, upon the grantor.

As a general rule, even in the case of a bona fide occupant of land, who supposes himself the rightful proprietor, Chancery will not sustain a claim for the value of improvements after deducting rents and profits.

[Quere,—Would the occupant be accountable for the rents and profits of the land as he originally entered it,—or as improved? *Harper, Ch., in Thompson vs. Bostick.*]

The case of a party purchasing from one who had a power to sell, but whose contract was void for exceeding his power, would be an exception; but not after notice. Yet, even after notice, there might be such circumstances of inducement held out by the adverse party as would render a rigid account inequitable.

Heard, at Columbia, August 1838, before JOHNSON, Ch., who made following decree:

The bill states that the complainant, Mrs. Dellet, and her brother, T. T. Willisson, were seized, as tenants in common, of a plantation in Edgefield district, on the Savannah river, opposite the city of Augusta, containing about 1000 acres; that on the 30th March, 1832, the said Willisson, for himself and the complainants, contracted with the defendant, Whitner, for the sale of the said lands, at the price of \$10,000, and on the 20th July, 1833, made and executed titles, for himself, to the said defendant, Whitner. The complainants deny that the said Willisson had any authority from them to sell or convey the said lands, and pray for a writ of partition to make division and severance thereof; but they offer, in their bill, to

affirm the said sale and the titles so made and executed, upon the condition that the defendants pay them 'one half of the said purchase money, the said Willisson being dead and his estate supposed to be insolvent.

The defendant, Whitner, sold and conveyed the land to one Isaac Henry, and he to the defendant, Starke, who is now in possession.

The defence mainly relied on is, that the complainant, Dellet, did authorize Willisson to sell the land and receive the purchase money, and that in pursuance of this authority, he did sell to Whitner and receive a great portion of the purchase money. Conceding that there was no authority from Mrs. Dellet, and that the Court could not compel her to make the titles, it is insisted that Dellet ought to be compelled to reimburse Whitner the amount of money which was paid to Willisson under his authority.

On the 22d January, 1832, Willisson wrote to Dellet, residing in Claibourn, Alabama, that the suit with Watkins had been terminated by his agreeing to pay \$1,000, and that they were then the undisputed owners of the land; and that he had "forthwith advertised the land for sale, on the 2d instant," that the land had been accordingly offered for sale, and that no more than \$11,000 being offered, on a credit of one, two, three and four years, he had declined taking it, "the less reluctantly, because I was anxious to hear from you." He then suggests the propriety of Dellet "appointing an attorney in fact here, with a power to sell, with a view to the future execution of the title by yourself and your wife."

In answer to this letter, Dellet writes to Willisson, under date 30th January, 1832; "You request my opinion respecting the disposition now to be made of the land, and in giving my opinion I have no difficulty. The only opinion I can give, and all that I can with propriety say, is, *make such sale and such disposition of the land as your own judgment points out or*

sanctions, and I will be content. I will, however, in addition, make one or two suggestions; that is to say, would it not be better to *sell for cash*, or if the sale is on a credit, to require such securities, say *notes of hand, with good security*, as might be cashed on such discount as might be agreed on? Would it not be proper to avoid a mortgage of the premises to secure the payment of the purchase money? Will not much difficulty, expense and trouble probably ensue, to sell on a credit of one, two, three and four years, in travelling to and fro in order to make the collections, together with the probability of suits to enforce said collections? Are not the above suggestions strengthened by the intention you say you have of leaving Carolina for Florida as soon as you can make the necessary arrangements? *The above hints are, however, merely for your reflection, and not thrown out for the purpose of impeding any arrangements you are disposed to make respecting the sale of the land.* One other suggestion I will here make. If you sell on a credit, suppose you *adjust the notes so as to enable you*, after retaining to yourself what will amount to your part and make you whole, let me have the disposition of the part due to your sister, so that, if we see proper, we may make some arrangement to realize, at once, as much as that part would be fairly worth, in cash or property, say negroes. But here let me again say, the above hints are not for the purpose of advising or directing you, and act as you think proper." He then speaks of another tract of land in which the family were interested, and adds—"Harriet and myself will, at any moment, *aid you in the transfer of all our right and title to the Hamburg lands,*" (the lands in question) "*but think it will be proper to make no warranty.*"

Acting on the authority supposed to be given by this letter, Willisson, on the 13th March, 1832, entered into an agreement by and with the defendant, Whitner, wherein he covenanted for himself and the complainants, to sell these lands to the

said Whitner, as trustee of Eliza A. Whitner and her children, and to make and execute to him, good and sufficient titles, "with a clause of warranty to be inserted therein;" and Whitner, on his part, covenanted to pay \$10,000, of which \$7,000 was to be paid in cash, and the remaining \$3,000 in one and two years, with interest. Whitner paid the \$7,000, in cash, to Willisson, and took possession of the land; afterwards, on the authority of Willisson, he paid \$1,000 to discharge Willisson's obligation to Watkins, on account of the compromise of the suit between them; and at another time he paid to Willisson \$300; so that the whole payments amount to \$8,300, leaving a balance due of \$1,700.

It does not appear that Dellet ever received a cent of the money, or that he ever knew of the sale until he received a letter from Whitner, on the subject of the titles, in 1834, after the death of Willisson.

In the construction of powers, the general rule is that general powers are to be liberally construed, for the obvious reason that, when general powers are obviously intended, all the powers necessary to their execution will be implied; whilst, on the other hand, special limited powers are to be strictly interpreted, because, in terms, the power is limited to the particular object; and whether we interpret Dellet's letter by one rule or the other, there can be no question that he authorized Willisson to sell the land to the extent of all his control over it, and that he contemplated disposing of Mrs. Dellet's interest also. "Make such sale or such disposition of the land as your own judgment points out." "The above hints are, however, merely for your reflection, and not thrown out for the purpose of impeding any arrangements you are disposed to make respecting the sale of the land." "Harriet and myself will, at any moment, aid you in transferring all our right and title," is a language that cannot be misconstrued or misconceived. You are to sell the land on such terms as you think

proper, and Harriet and myself will convey, according to the forms of law, our interest in it to the purchaser. This is not seriously controverted; but it is insisted, 1st, that it contains no authority to Willisson to receive the complainants' portion of the purchase money. 2d. Conceding that it does, yet in law, Dellet had no right to authorize Willisson to dispose of his wife's interest, and Whitner having purchased with a knowledge of all the facts, he is presumed to know the law, and therefore Dellet is not liable to reimburse any portion of the money paid, to Willisson, on that account.

I have found some difficulty as to the first of these propositions, but from the best lights I have been able to bring to bear on the subject, I incline to think that the letter contains an authority to Willisson to receive the purchase money. A naked power to sell land does not necessarily impart a power to convey, or receive the purchase money. This position is sustained by the case of *Minn vs. Jolliffe*, (1st Moody & Robertson, 326,) cited at the bar from one of the Digests; and although the book cannot be obtained here, I am satisfied with the correctness of the principle. Sales of real estates are frequently made through the agency of auctioneers, brokers and other agents, acting under mere verbal authority, and whether in that form or in writing, their power, according to the usage of the country, consists in making a treaty for the sale. The seller will not be supposed to have confided to them, in this loose way, the power of disposing of his estate without first ascertaining that they had acted in pursuance of his authority, nor would the purchaser part with his money without being first secure in his title. But there is no question that these powers may be superadded to the power to sell. The owner of an estate may, if he will, authorize another to sell and convey and receive the price. Now, in this case, the power to make title is expressly reserved to the complainants, and

whether the power to receive the money was conferred, is the question.

Such is the imperfection of language, that it is often very difficult to express the precise idea intended to be conveyed, and such the incongruity which is frequently found in contracts drawn up in haste, or by inexperienced clerks, that the courts have been obliged to frame rules founded on experience, to ascertain their meaning; amongst these will be found the general rule, that the intention of the parties, to be collected from the whole instrument, shall prevail. The situation and relation of the parties, and the subject matter of the contract, are also frequently called in to aid in the interpretation; and these rules apply to all compacts, whether it be the constitution of a government, or a contract for the sale of a mouse trap.

The complainants and Willisson were the joint owners of the land; the former resided in Alabama, at the distance of 400 or 500 miles, and Willisson here where the sale was to be made. Dellet's instructions are to "sell for cash," and, if they had stopped here, how was it possible for Willisson to make a sale without the power to receive the money? Dellet was not here to receive it—there was no intimation of a wish or an intention to be present to receive the money, and if he thought proper to remain at home, any contract that Willisson, who was equally interested, might make, might have been rendered nugatory. That he did not contemplate being present is, I think, apparent from his further instructions: "make such disposition of the land as your own judgment points out or sanctions, and I will be content;" sell for cash "if you can;" if not, "take notes, and take care so to adjust them that I may have the disposition of that part to which my wife is entitled," is the language of the letter. Now this power, although limited to a particular object, is, under the authority to "make such disposition of the land as your judgment shall

point out," as general, as to that particular object, as language can make it. The only limitation to it is the reservation of the right of the complainants to make the titles, and it consequently includes the power to receive the money, for that is incident to the disposition of it.

The second position is, I think, very fully sustained by the case of *Owens vs. Hull*, cited from (9 Peters, 607, 627.) There, an executor authorized an agent to sell some slaves which belonged to his testator in Louisiana. According to the laws of that State, an executor could not dispose of this property without an order from the tribunal having jurisdiction over the subject. The agent sold, however, without such order, and the slaves were afterwards recovered from the purchaser by the persons entitled under the will, and this was an action by the purchaser, against the executor, to recover back the money paid for the slaves; and the Court held that he was not entitled to recover, on the ground that the authority to sell implies the power to sell only according to the forms of law where the sales were to be made; and presuming, as the law does, that the purchaser knew what the law was, he contracted to purchase no more than the agent was entitled to sell, and that the principal was not bound. Now, according to the laws of this State, Dellet had no right to dispose of his wife's lands beyond the term of his own life, and one third part in fee, if he survived her; and if Whitner, knowing, as the law presumes, and as a lawyer of long standing he must have known, had paid the money to Willisson, on the agreement of Dellet to make titles for himself, according to the rule before laid down, he would have no right to claim from Dellet a remuneration for the money paid to Willisson on account of his wife's interest. He would have got all that he contracted to purchase, and it would have been his own folly to make a bad bargain. This case does not strike me, however, as falling within the principle. Dellet did more than authorize Wil-

lisson to dispose of his own interest—"my wife and myself will, at any moment, aid you in the transferring all our title and interest," is the language of the letter. What is this but a guaranty that his wife would join him in making a title to the purchaser? Say that he has no power to compel his wife to join him in a conveyance, yet she may voluntarily, or on sufficient consideration, do so. If one will undertake to do an act, not in its nature impossible—if he fails he is clearly bound to refund the consideration paid.

There is, however, another ground on which I think the complainant must prevail. The authority given by Dellet to Willisson was merely to sell, and it is very clear that, under this power, he was not authorized to covenant that Dellet and wife should make a conveyance with a covenant of warranty. In *Gibson vs. Calt*, (7 Johnson's Rep. 390,) the owners of a ship authorized the master to sell the ship as they themselves might or could sell her. At the time of the sale, the master represented to the purchaser that she was a registered ship, when in fact she only sailed under a coasting license, and it was held that the owners were not answerable for this false representation. *Nixon vs. Hysirott*, (5 Johnson, 58,) is more distinctly in point. There, the agent's authority was to grant, sell, release, &c., in fee, certain lots of land, and to execute, seal and deliver, in the name of his principal, such conveyance and assurance in law to the purchaser, as should be needful and necessary, according to the judgment of the attorney;—and it was held that a conveyance or assurance was good without the usual covenants of seisin or other personal covenants, and that the principal was not bound by such covenants. *Fenn vs. Harrison*, (3 Term Rep., 757,) is to the same point. Besides, here there is an express negation of the authority to warrant—"Harriet and myself will, at any moment, aid you in the transferring of all our right and title," "but think it will be proper to make no warranty." This, it is

said, is controlled by the general discretionary powers so amply given, but it is impossible to regard it otherwise than as an express limitation of those general powers.

In this contract there is an express covenant by Willisson, in behalf of himself and the complainants, to make good and sufficient titles, with *a clause of warranty* to be inserted therein. This covenant was not binding on Dellet, nor was Whitner bound to accept a title without the warranty. Whitner has proposed, in his answer, to accept the title without the warranty, and it may be said that Dellet is bound by the act of his agent, to the extent of his authority, although it may be void for the excess. This is correct as regards executed contracts. There, the principal would be bound to the extent of the authority given, and the agent, for any thing that may have exceeded it. But this is an executory contract, and wants one of the essential constituents of such a contract—the aggregatio mentum of the civilians. Dellet says, I will not warrant, and Whitner says, I must have a warranty. Dellet has never received any part of the purchase money, nor done any other act affirmatory of the contract. On the contrary, he was not advised of its existence until some two years after, and after the death of Willisson, when he promptly refused to perform it.

The counsel have suggested the propriety of an order, founded on the complainants' proposition to make titles on the receipt of one half of the price at which the land was sold—but, turning that matter through my mind since the argument, I am satisfied that it is a subject over which the Court has no power. Mrs. Dellet is not bound even by this offer, and for that reason, the Court would not compel Whitner to accept it. In addition, he might think proper to abandon the contract entirely, and in that event such an order might embarrass him. The parties are left to arrange this matter as they please.

Out of the cash paid by Whitner, \$1,000 was appropriated to pay Willisson's liability on account of the compromise of the suit with Watkins. That ought to be borne equally, and the counsel for the complainants say that they are authorized, in their behalf, to admit their liability to Whitner for one half. The expenses incurred by Willisson, in the prosecution of the bill to redeem the mortgage and in defence of the action at the suit of Watkins, ought also to be borne equally by the complainants and Willisson; and it is said that there are other mutual accounts between them. No application for a reference of these matters to the commissioner has been made, and perhaps it would be irregular, as Willisson's representatives are not before the Court; and it is only noticed to leave this branch of the case open for future proceedings, if the parties shall think proper to move in it.

It is therefore ordered and decreed, that the complainant do pay to the defendant, Benjamin F. Whitner, the sum of five hundred dollars, with interest from the twenty-fourth day of October, 1833; and that a writ of partition do issue to divide the lands described in the pleadings, equally, between the complainants and the defendant, W. W. Starke. The complainants must pay their own costs, and Whitner must pay the costs of the defendant, W. W. Starke, and his own.

The defendants moved the Court of Appeals to reform the foregoing decree, in the particulars and upon the grounds following:

- 1st. Because no writ of partition should have been ordered.
- 2d. Because the complainant, James Dellet, should have been ordered to execute titles for said land, and to cause titles to be also executed by his wife.
- 3d. Because the authority given, by Dellet to Willisson, to sell the land, did not restrain him from covenanting for a clause of warranty.

4th. Because the agreement between Willisson and Whitner does not bind Dellet to insert a clause of warranty.

5th. Because, even if Willisson was restrained, by the authority from Dellet, from covenanting for a clause of warranty, and even if Dellet was bound, by the agreement between Willisson and Whitner, to insert such a clause, yet, as defendants have paid about three-fourths of the purchase money, and have taken and held possession of the land, and have waived such a clause, Dellet is bound to execute titles and to cause his wife to execute the same.

6th. Because the complainants should have been ordered to pay the entire costs of the case.

DUNKIN, Ch. Mrs. Dellet, and her brother, Thomas T. Willisson, were tenants in common of the Hamburg lands. The object of the bill was a partition of these lands. Although partition was, originally, a matter of peculiarly equitable cognizance, yet, by the Acts of 1748 and 1791, concurrent jurisdiction is vested in the Court of Common Pleas. Proceedings in partition could have been there instituted by the complainants, and it was not suggested that any legal obstacle could have been interposed to their right of recovery. Perhaps it may disembarass the case of some complexity, if this be regarded as an application, on the part of the purchasers, to restrain the complainants from prosecuting their proceedings at law for partition. It is not perceived that their claim will be prejudiced by this view. For although there are cases, in which the Court does not consider itself bound to aid either party, as against the other, where the equities are equal, the rule is here inapplicable. The Court would grant them relief (if at all) to the same extent, and on the same principle, as it will be now administered.

It may be proper, first, to enquire what was the extent of Willisson's authority under the letter of 20th January, 1832;

supposing both the complainants to be bound by that letter.

In April, 1822, Dr. Watkins instituted an action of trespass to try the title for these lands, against Willisson, in the Circuit Court of the United States. The defendant adduced no paper title, but relied on his possession. Under the charge of the Judge, a verdict was rendered for the plaintiff, which verdict, after full argument, was set aside by a majority of the Supreme Court of the United States, at January term, 1830, and a *venire facias de novo* awarded. Willisson afterwards compromised the case by agreeing to pay Dr. Watkins one thousand dollars.

In reply to Willisson's letter, informing him of the arrangement of the suit, and asking his opinion as to the disposition of the lands, Dellet writes the letter of 30th January. It is not proposed to comment on all the parts of that letter. This Court concur in opinion with the Circuit Chancellor, that Willisson was thereby authorized by Dellet to contract for the sale of the land, and to receive the purchase money. But was he authorised to contract for a covenant of warranty? It appears to the Court that the language of the letter is sufficiently explicit. "Harriet and myself will, at any moment, aid you in the *transfer of all our right and title* to the Hamburg land." In common parlance this is the very definition of a quit claim, as distinguished from a conveyance with warranty. The letter adds "but think it will be proper to make no warranty." This, it would seem, left nothing for construction. When it is remembered that both Dellet and Willisson, as well as the purchaser, Whitner, were lawyers, it is difficult to suppose that the extent of the authority was mistaken. It is suggested that other parts of the letter would admit of a different construction. But the Court do not perceive the discrepancy. Willisson, relying on no other defence than the Statute of Limitations, had conducted the cause of himself and the complainants to a successful issue. He had secured their confidence

in his skill and fidelity. They were willing to commit to his discretion the interests, which, if he had not created, he had contributed, so effectually, to secure. As to the terms of sale, the mode and manner of payment, &c., although hints are offered for his consideration, all is submitted to his better judgment. But Dellet did not require the recent decisions to teach him the uncertainties of litigation, or the danger of insuring a title to land. The character of his title, too, was precisely that which, in his situation, he would more readily undertake to transfer than covenant to defend. After presenting the relative advantages of a cash, and credit sale, and providing for a settlement in either contingency, he adds "the above hints are not for the purpose of advising or directing you," and concludes by an assurance of their readiness to aid him in the *transfer of all their right and title*, "*but think it will be proper to make no warranty.*" It seems to the Court that the "hints" and "injunctions" are plainly distinguishable; and that, if this paper was before the parties when the contract of 30th of March, 1832, was executed, neither the agent nor the purchaser supposed, that the covenant of warranty was within the letter of the instructions. Whitner must have relied on the personal influence, or individual guarantee of Willisson. If he had filed a bill against the principals for specific performance, including the covenant of warranty, a majority of the Court are very clear that the claim could not have been sustained.

But it is said that Willisson had authority to sell without warranty; that he has only exceeded his power; that the execution of a power may be good in part, and bad in part; and, that, in many cases, only the excess of a power will be void, the residue good. It is then insisted that Dellet must be held responsible to the defendants for his inability to carry into effect the contracts of his agent, to the extent to which the power was good. The principle on this subject is sufficient—

ly well stated in *Alexander vs. Alexander*, (2 Ves. 642,) and also in *Sugd. on Powers*, 549. Where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but, where the boundaries between the excess and execution are not distinguishable, where they are not precise and apparent, it will be bad. The answer of the defendant, (Whitner,) states that Willisson, in consideration of \$10,000, "covenanted to execute to him warranty titles to the land;" "that the price of the land was enhanced by the agreement of Willisson, in behalf of himself and the complainants, to give a general warranty title," and he submits "that a reasonable abatement should be made on the price agreed to be paid for the lands, so far as complainants' interests are concerned, inasmuch as they refuse to give full warranty title."

Who can undertake to say that the covenant of warranty was merely "something *ex abundanti* added," that the execution shall be good, and only the excess void, because the boundaries are distinguishable, precise, and definite? It does not resemble the case cited from 9 Johns. R., *Waters vs. Travis*, where a party undertook to sell 439 acres of land, at a dollar per acre, and was entitled only to 234 acres; nor to the illustration in the argument, of an agent selling two horses, who had authority to sell only one. If, in *Waters vs. Travis*, the land had been sold for a gross sum, and the value had been enhanced in consequence of a mill seat, a spring, or a gold mine, which was afterwards found not to be within the boundaries, or if, in the latter instance, the horses had commanded a high price as a match, the cases would be nearer parallel. But, as it is said in the *Attorney General vs. Griffith*, (13 Ves. 576,) "there is no principle for reforming the contract. It is all conjecture. The Court can never act with safety in executing such a proposal." In *Young vs. Nash*, (3 Atk. 190,) Lord Chancellor Hardwicke held that the con-

tract must be performed in its entirety, or not at all. "No body can tell," says he, "what it is that parties have laid the greatest weight upon, in coming to agreements, and therefore it would be attended with bad consequences, if agreements were to be split, and one part to be decreed and another not."

What was the value at which the parties rated a conveyance of the land without warranty? What price was put by them on the covenant of warranty? What sum could the complainants have demanded from Willisson as their share of the purchase money? It cannot be doubted that a contract for the land, without warranty, was a contract which Whitner and Willisson never made; that Whitner never agreed to pay \$10,000 for such a title; and if the complainants, relying on the agreement, had filed a bill for specific performance, tendering a title without warranty, the claim would be dismissed. If their bill had insisted on reforming the contract, according to the power conferred, and on a reasonable abatement of the price, it can scarcely be denied that a decree in their favor would impose, on the purchaser, an arrangement which he had never made, which his mind had never contemplated, and to which he would, perhaps, have never assented. Agreements, between persons capable of contracting, should be mutually obligatory, or not at all. The agent of the complainants made no contract for a sale without warranty. He and Whitner may very well have differed as to the value of such title. The complainants may have been bound to receive what Willisson agreed to take for a transfer of their right and title without warranty; but, as he made no such agreement, Dellet cannot now be required to indemnify the defendant for not transferring that, which he, the defendant, never agreed to purchase, and for which he could not be compelled to pay.

Then is the defendant, Starke, entitled to reimbursement for the improvement to the land, made, as he admits, since he

had notice of the complainants' claims? Perhaps it may be well, first, to regard him as vested with all Willisson's rights, and then to enquire whether a tenant in common is entitled to compensation for improvements made on the land of which he was the exclusive occupant, but aware that he was not the exclusive proprietor. In *Green vs. Biddle*, (8 Wheat. 69,) the relative rights of the owner and adverse occupant of land are discussed. 'The rule of the English Court of Chancery is there fully recognized, which allows an account of rents and profits, in all cases, from the time the title accrued, provided that it do not exceed six years, unless under special circumstances. In the class of excepted cases, the account is confined to the time of filing the bill. In the case cited, the Court say "upon the whole, then, we take it to be perfectly clear, that, according to the common law, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant, from some period prior to the judgment of eviction, or decree." That case arose under the "occupying-claimant" law of Kentucky, by which the owner of the land was compelled to pay, to a certain extent, the assessed value of the improvements made on the land by the bona fide occupant, even after notice of an adverse title. It became necessary to consider how far that law could be vindicated on principle, or from precedent. The Court say, "the rule in *Coulter's* case, (5 C. 30,) is that meliorations of the property, (which, necessarily, mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claim, of the proprietor, for profits which have accrued to the occupant during his possession. But, by this Act, the occupant is entitled to the value of the improvements, to whatever extent they may exceed that of the profits; not on the ground of set off against the profits, but as a substantive demand. If the principle which this law asserts, has

a precedent to warrant it, we can truly say, that we have not met with it." In another part of the judgment, it is said "nothing can be more clear, upon principles of law and reason, than that a law which clogs the owner's recovery of his land by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. *If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions.*"

Recognizing the soundness of these principles, the Court think that, *as a general rule*, even in the case of a bona fide occupant, who supposes himself the rightful proprietor, Chancery will not sustain a claim for the value of improvements beyond the rents and profits. And it is held also that the bona fides of his possession ceases so soon as he has notice of the adverse title. It is difficult to prevent the application of the rules to the case of a co-tenant. Although he has an admitted interest in the land, yet he is aware that this interest is limited and not exclusive. Every facility is afforded by the laws for making partition, and it is his own fault if he erects valuable improvements before his portion has been ascertained and set off to him. But, further, he has no right, unnecessarily, to "clog the recovery" of his co-tenant, and, by changing the character of the premises, interpose obstacles to a partition, which did not originally exist. By the Act of 1791, if the land cannot be fairly and equally divided, the Commissioners may allot the whole to one of the co-tenants on payment of a sum of money, or may recommend a sale. Now, if the tenant in possession may make valuable improvements on a part of the land, it is in his power effectually to prevent a partition, and compel his co-tenant to buy, or sell the whole,

contrary, perhaps, both to his interests and wishes. Besides, as was said by Chancellor Kent, in *Moore vs. Cable*, (1 J. C. R. 388,) "to make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse." The Court has found no authority for the claim of the defendant, except the case of *Swan vs. Swan*, cited at the bar, from (3 Exc. Rep. 443; 8 Price, 518,) and, on reference to the point decided in that case, it will be found that it was "referred to the Deputy Remembrancer to take an account of what had been expended *necessarily, or with the concurrence of the plaintiff.*" The Court is not prepared to go further. And the decision in *ex parte Palmer*, (2 Hill, C. R. 217,) is rather an affirmance of the restrictive policy of the Courts in questions of compensation for improvements.

These views have been rendered more satisfactory to my own mind, from having accidentally met, since the argument of the cause, and indeed since the opinion was thus far written, with the decree of Chancellor Harper, in an unpublished case, *Thomson et al. vs. Bostick et al.*, affirmed by the Court of Appeals, at Columbia, May Term, 1831. The bill was filed, by one tenant in common, against the others in possession, for rent. In the account, the Commissioner had credited the defendant with improvements, clearing the land, putting up a cotton screw, &c., to which the complainant excepted. The Chancellor decided that the defendants were chargeable with the rent of the land, *estimated as it was when they took possession*, and that *they were not entitled to credit for the improvements.* In the course of his observations he says "one man has no right to improve the land of another at the owner's expense. But if the tenant out of possession is not to be charged for a share of the improvements, it would be plainly inequitable that he should be allowed to claim the enhanced rent produced by means of such improvements. If the tenant in possession

should build a mansion on the land, or a mill, or manufactory, it would be enough that the co-tenant should take his share of the land increased in value by these improvements, without charging the tenant, at whose expense they were constructed, with rent for the time they were used by him. To apply to the present case. *If the premises were improved by the clearing and fencing of new land, or by erecting the cotton screw, defendants have no right to charge for that. They had no right to make improvements at their co-tenants' expense, without their consent.* But they are not to be charged with the rent of the land cleared by them, because the premises were rendered capable of producing that rent by means of their improvement." The Court of Appeals reserved their opinion as to the liability of the defendants for the enhanced rent, because the complainants did not appeal; in all other respects, the judgment of the Chancellor was affirmed.

But there is a different view, in which the claim of the defendant may be regarded with more favor, and the Court are very ready to give him the benefit of it. A class of cases exists, in which he who takes possession of lands, under a prima facie legal title, and makes valuable and lasting improvements, which must pass, with the freehold, to the party asserting his paramount right, is deemed, by the established rules of Chancery, entitled to compensation. Such is the case of a vendee, who takes possession of land, under an agreement for a sale. So also of a mortgagee in possession, where the Court will not permit a redemption without payment for necessary improvements. If these improvements had been made by Whitner, relying on the authority of Willisson, and before notice from the complainants, I should think him strictly within the protection of the rule. It is admitted, however, that the improvements were not made until after notice of the want of authority in Willisson, and of the intention of the complainants to assert their rights. But, it seems, the claim was always accom-

panied by an assurance that the defendant might retain the land, if he would pay to the complainants their moiety of the purchase money with interest. This offer is repeated in the bill, and again reiterated, by the counsel of the complainants, in the course of the argument here. It is impossible to reconcile the acts of the defendant with ordinary prudence, but on this consideration, and his confident expectation of becoming the ultimate owner, and his conviction that the substantial object of the litigation was to determine the complainants' right to recover from him a moiety of the purchase money. This Court agree with the presiding Chancellor that, in the state of the pleadings, it would not have been proper to decree an execution of this arrangement. But it would be inequitable, under the circumstances, to allow to the complainants the gratuitous benefit of these improvements. The measure of the defendants' equity can be more properly fixed when the enquiry to be directed shall have been satisfied.

It is ordered and decreed, that the decree of the Circuit Court be affirmed.

It is further ordered, that it be referred to the Commissioner to enquire and report what improvements on the land have been made by the defendants, and at what time; also, the extent to which the value of the premises has been enhanced in consequence of those improvements. All further questions in relation thereto being reserved until the coming in of the report and the return of the Commissioners in partition.

JOHNSON, Ch., concurred.

Gregg, for the motion.

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ACCOUNT.

1. Where an executor exhibits such an account as will enable the parties interested readily to test its correctness, distinguishing between sums received on account of principal and those on account of interest, then the interest is to be set down to the year in which it was actually received. *Duncan ex'r. vs. Tobin et al.* . . . 143
2. But where, in accounting for the proceeds of sales of his testator's estate, the Executor has only charged himself with gross sums, as he received them, not distinguishing between principal and interest; he is chargeable with the amount of sales when due with interest on it annually, which, in striking the annual balances, will be set off against the disbursements of the year. *Ibid.*
3. If only a part of his accounts are accurate and satisfactory, he shall have the benefit of them *pro tanto*. *Ibid.*
4. Suggestions as to the proper mode of stating and vouching accounts before the Commissioner. *Ibid.*

ALTERATION, (of a written instrument,) See *Deed*, 1.

APPOINTMENT.

1. Conveyance in trust to the use of W. S. for life; after to such person as he shall appoint by *will*, or in default thereof, to his children. W. S. mortgaged the estate, (which was sold under a fore-closure, in his lifetime, and bought in by the creditor,) and died insolvent and intestate. The Court would not restrain the children from enforcing their claim as remainder men. *Ben-tham vs. Smith et al.* . . . 33

2. A power to appoint by *will* is not executed by a mortgage to creditors with fore-closure and sale. *Ibid.*

ASSETS.

1. There being a balance remaining in the Sheriff's hands, after sale of a part of an intestate's estate in satisfaction of executions, the administrator was not entitled to the surplus, either in law or equity, as assets for payment of debts; though the creditors, themselves, might have claimed it at law. *Garlick, adm'r. vs. Patterson et al.*.....27

ASSIGNMENT, (fraudulent.) See Debtor,.....1

DEBTOR.

1. Assignment, by a debtor, for benefit of such creditors as should accept a rateable proportion, but not to exceed 40 per cent, of their claims; the surplus, if any, to be returned to the debtor. *Held*, under all the circumstances of the case, to be fraudulent and void under stat. 13 Eliz. *Jucot vs. Corbett et al.*.....71

DEED.

1. What alterations on the face of an obligatory written instrument will avoid it, and under what circumstances. *Burton vs. Pressly*,.....1
2. D. disposed of all his estate by will, and afterwards, by deed, gave all his real and personal property to "my named children in my will, and I do acknowledge this day to be them and no others then those that are named in my will, and the use ther in meashend." This was a gift, irrevocable, of all that was covered by the will at the date of the deed; that is, of the whole estate, as then existing. *Dawson vs. Dawson*.....148
3. It was a gift, *in presenti*, to take effect at the grantor's death; but, in the mean time, a trust resulted to the grantor for his life. Therefore, after-acquired property, if purchased with the profits accruing after the date of the deed, belonged to the grantor; but otherwise, if paid for out of the *corpus*. *Ibid.*

DEVISE.

1. Bequest to a wife, for life and widowhood, with remainders over, and in case of a second marriage, to "devolve upon the persons mentioned in the said will as if she my said wife had departed this life; my will being that she shall have no interest whatever in my estate after her second marriage." *Held* to be a sufficient implication of an intent to exclude the wife from her dower. *Wilson ex'r. vs. Hayne et ux*.....37
2. Under the A. A. 1789, providing for posthumous children, the posthumous child's share is held subject to the provision and limitations of the will. *Ex parte Warren et ux*.....44
3. This does not conflict with the decision in *Ex parte Warner et ux* (Dudley C. R. 154,) for the event on which that case turned was one not provided for or contemplated by the will. *Ibid.*

4. How, *after the expiration* of the child's estate, the remainder will be affected by the limitations of the will, has not been determined. *Ibid.*
5. Devise to two sons for life, with remainder to their issue, and, "in case my *surviving son* shall depart this life" without issue, remainder over. These words, by necessary implication, create cross remainders between the sons; as much so as if it had been "in case both my sons," &c. *Seabrook adm'r. vs. Mikell et al.*.....80
6. And, although there was an express limitation to the survivor, if either of the sons should die *under age, without issue*; which would appear to preclude such a limitation if he should *come of age* and then die without issue: yet, it seems, the implication was not the less necessary in that case. *Ibid.*
7. Devise to two sons for life, as tenants in common, the share of each in remainder to his issue, "but in case either of said sons should depart this life under age, without leaving any child or children living at his death," to the survivor: *Held*, that the testator meant "under age or without," &c., and on the death of one, without issue, *after coming of age*, the limitation to the survivor was effectual. *Ibid.*
8. Where one bequeathed to his wife all the property real and personal which he had received by his marriage, and also devised to her, specially, a certain tenement and lands, on which a portion of the money received by marriage had been expended; it seems that the wife would be entitled to both without any deduction. *Pell vs. Ball's Executors*.....99
9. Devise of a plantation, called 'V.,' and "so much money as, with the said plantation, 'V.,' will be equal in value to the C. T. plantation, in lieu and to stand in place of so much land," is, as to the money, a general, and not a specific bequest. *Jenkins et al. vs. Hanahan et al.*.....129
10. Bequest of all the slaves of which testator might die possessed, to be divided into three parts; one given to his widow and one to each of two children: general, not specific bequests. *Ibid.*
11. Where an abatement had to be made, from bequests to children, for payment of debts, &c., it seems that the testator's distinctly expressed intention, to make the shares of the children equal, would overrule any technical distinction, (in liability to contribute,) between general and specific legacies, by which that equality would be disturbed. *Ibid.*
12. Bequests were made to children, provided that those, to whom negroes had been advanced, "will bring forward such negro or negroes, with their issue, or increase, to the division, to be justly valued as their, or part of their respective and equitable portions of the whole." Negroes so advanced, and since dead without increase, are not to be accounted for: those sold by the legatee,

so that, by his own act, it is unknown whether they are dead or alive, will be presumed alive, and rated at their probable value at the time of the division. The same of those sold by the sheriff.

Dawson vs. Dawson.....148

—— [estate under,—whether in common, or joint.] See *Joint tenant*.....1
DOWER.

1. Bequest to a wife, for life and widowhood, with remainder over, and in case of a second marriage, to "devolve upon the persons mentioned in the said will as if she my said wife had departed this life; my will being that she shall have no interest whatever in my estate after her second marriage;" held to be a sufficient implication of an intent to exclude the wife from her dower. *Wilson ex'r. vs. Hayne et ux.*.....37
2. By proving the will and receiving the profits for five years, it seems the widow must be held to have determined her election and relinquished her dower. *Ibid.*

ELECTION.

1. By proving the will and receiving the profits of a bequest for five years, it seems the widow must be held to have determined her election and relinquished her dower. *Wilson ex'r. vs. Hayne*.....37

EVIDENCE.

1. Under the 35th Rule of Court, it is in the Chancellor's discretion what evidence shall be required to prove the demand of a bill taken *pro confesso*. *Southern Steam Packet Company vs. Roger et al.*.....48
2. B. and his wife perished, on board of a steamboat, at sea, by the explosion of one of the boilers, which shattered the vessel and caused it to fall to pieces and sink in about half an hour. Upon evidence that Mrs. B. was seen, and was heard to call loudly for her husband, immediately after the disaster, and that he was not heard to answer, nor was heard or seen at any time after the explosion; held that Mrs. B. had survived her husband. *Pell vs. Ball's ex'rs*.....99
3. Such general considerations as age, health, &c., may be resorted to, to aid conjecture: "But where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact." *Ibid.*
4. It seems, where the benefits of survivorship were not mutual, the burthen of proof rests on the side of the party to whom the survivorship would have been beneficial. *Ibid.*
5. The genuineness of a note, sealed and attested, being called in question before the Commissioner, the signature of the maker was proved by three witnesses; that of the attesting witness was not proved, and two witnesses thought it spurious. The Commissioner reported the note as genuine, and the Chancellor on

- circuit, confirmed the report. Notwithstanding which the Court, under the circumstances, ordered an issue at law to try the question. *Blackman ex'r. vs. Slogner*.....175
6. According to English authorities, the signatures of subscribing witnesses to a bond or note must be proved; and so it seems to be here: but the A. A. 1802, dispensing with such proof in certain cases, unless the defendant deny, on oath, that the signature is his, ought to be recognized in its spirit, though not capable of a literal application to the Equity jurisdiction. *Ibid.*
7. But, if proof of attesting witness's hand writing was not necessary, yet the fact of there being evidence against its genuineness, raises such a doubt as to make a fit case for a jury. *Ibid.*
8. A claim preferred against administrators, for large sums alleged to have been advanced to their intestate, was rejected by the Court, on the ground of the claimant's probable inability to advance such amounts, the staleness of the demand, and other strong circumstances of suspicion, although sustained by absolute and unimpeached vouchers. *Ex parte Hanks*.....203
9. Where a sheriff's deputy or clerk has paid out money on executions, it will be presumed, without proof, to have been from funds officially received by him for that purpose, and not to have been advanced from his private funds. *Ibid.*

—— (by prescription or lapse of time.) See *Presumption*.

EXECUTORS AND ADMINISTRATORS.

1. There being a balance remaining in the Sheriff's hands, after sale of a part of an intestate's estate in satisfaction of executions, the administrator was not entitled to the surplus, either in law or in equity, as assets for payment of debts; though the creditors themselves might have claimed it at law. *Garlick adm'r. vs. Patterson et al.*.....27
2. Absent and non-resident executors, of one deceased in this State, cannot be made amenable to suits in this Court, when neither they nor their testator have property in the State. *Garden vs. Hunt's ex'rs.*.....42
3. A testator's executor married the widow of the deceased, to whom a life estate in a vacant lot had been devised, to commence at her eldest child's coming of age. After marriage and before the life estate commenced, the executor erected buildings, out of his own funds—there being none of the estate—on the lot, and afterwards, as tenant *per autre vie*, enjoyed the same for many years, till the wife's death. The improvements being permanent, and at the time of erection likely to be beneficial: held, that the executor was entitled to remuneration. *Godfrey vs. Schmidt*.....57
4. He was entitled to the value of the improvements as they

- stood, when the estate left his hands, that being less than the amount expended, and it appearing that his profit out of the estate had not been as much as the interest on his money. *Ibid.*
5. Executors are not entitled to charge their estate with the expense of an accountant to arrange their own accounts. *Jenkins vs. Hanahan*.....129
 6. Where an executor exhibits such an account as will enable the parties interested readily to test its correctness, distinguishing between sums received on account of principal and those on account of interest, then the interest is to be set down to the year in which it was actually received. *Duncan ex'r. vs. Tobin*..143
 7. But where, in accounting for the proceeds of the sales of his testator's estate, the executor has only charged himself with gross sums, as he received them, not distinguishing between principal and interest; he is chargeable with the amount of sales when due, with interest on it annually, which, in striking the annual balances, will be set off against the disbursements of each year. *Ibid.*
 8. If only a part of his accounts are accurate and satisfactory, he shall have the benefit of them *pro tanto*. *Ibid.*
 9. Suggestions as to the proper mode of stating and vouching accounts before the Commissioner. *Ibid.*
 10. At an administrator's sale, the notes of a firm, then in good credit, were taken without security. The administrators were responsible for loss by the subsequent insolvency of the firm. *Massey vs. Cureton*.....181
 11. One of two administrators took the principal management of a sale, and, although advised against it by the other, took notes of a certain firm without security; the other acquiescing without further opposition. On these, with other circumstances, the first was held, alone, liable for the loss occasioned by his imprudence. *Ibid.*

FEEs.

1. The A. A. 1821, fixing the *receiver's fees*, applies not only to Commissioners, but equally to all other persons appointed receivers. *Massey vs. Massey*.....159

FRAUD. See Debtor, 1.

HUSBAND AND WIFE.

1. The Commissioner has a sufficient warrant for paying over a wife's distributive share to the husband, (upon the joint receipt of husband and wife,) in a general order of court to pay the parties according to their respective rights. *Geiger vs. Geiger*...162
2. Property settled on an intended wife,—to be her exclusive property and at her disposal, without being subject to the debts of her intended husband, or to any interference by him, but first to be liable for her own debts and contracts: *held* liable for her note,

given for family supplies, without looking into the propriety or necessity of the expenditure. *Clark vs. Makenna et ux.*.....163

3. Previous decisions, in relation to the liability of wife's separate estate, reviewed. *Ibid.*

— See *Marriage Settlement*, 1.

IMPROVEMENTS.

1. A testator's executor married the widow of the deceased; to whom a life estate, in a vacant lot, had been devised, to commence at her eldest child's coming of age. After marriage and before the life estate commenced, the executor erected buildings, out of his own funds—there being none of the estate—on the lot, and afterwards, as tenant *per autre vie*, enjoyed the same for many years, till his wife's death. The improvements being permanent and, at the time of erection, likely to be beneficial: held, that the executor was entitled to reimbursement. *Godfrey vs. Schmidt.*.....57

2. He was entitled to the value of the improvements, as they stood when the estate left his hands; that being less than the amount expended, and it appearing that his profit out of the estate had not been as much as the interest on his money. *Ibid.*

3. As a general rule, even in the case of a bona fide occupant of land, who supposes himself the rightful proprietor, Chancery will not sustain a claim for the value of improvements after deducting rents and profits.

[*Quere*,—Would the occupant be accountable for the rents and profits of the land as he originally entered it,—or as improved? *Harper, Ch.*, in *Thompson vs. Bostick.*] *Dellet ads. Whittier.*.....213

4. The case of a party purchasing from one who had a power to sell, but whose contract was void for exceeding his power, would be an exception; but not after notice. Yet, even after notice, there might be such circumstances of inducement held out by the adverse party as would render a rigid account inequitable. *Ibid.*

ISSUE AT LAW.

1. The genuineness of a note, sealed and attested, being called in question before the Commissioner, the signature of the maker was proved by three witnesses; that of the attesting witness was not proved, and two witnesses thought it spurious. The Commissioner reported the note as genuine, and the Chancellor on circuit confirmed the report. Notwithstanding which the Court, under the circumstances, ordered an issue at law to try the question. *Blackman vs. Stogner.*.....175
2. *Quere*, whether proof of the attesting witness's hand writing was necessary; but even if not, yet the fact of there being

evidence against its genuineness, raises such a doubt as to make a fit case for a jury. *Ibid.*

JOINT TENANT.

1. "I direct that the proceeds [&c.] be divided into ten equal parts," six of which were separately bequeathed to six several persons, and then "I devise and bequeath the remaining four tenths to my four nieces," &c., designated by name: *held* that the nieces were joint tenants, and the share of one who died before the death of the testatrix, went to the survivors. *Herbembont's ex'rs. vs. Thomas et al.*.....21
2. The A. A. 1748 and 1791, (and it seems also, that of 1734,) modifying the title by joint tenancy, have no effect, except in case of the interest actually vested. *Ibid.*

JURISDICTION.

1. Absent and non resident executors, of one deceased in the State, cannot be made amenable to suits in this Court, when neither they nor their testator have property in the State. *Garden vs. Hunt's ex'rs.*.....42
2. The Court of Equity has jurisdiction in the case of "an agent entrusted with funds of his principal, and having received other funds in the course of the agency, for which he is accountable, and who comes to render his account and have it allowed and himself discharged from his trust, and if any balance be due him, that, in the administration of complete justice, it be decreed him;" though it appear that the party is not without a remedy at law. *Kerr vs. Steam Boat Company*.....189
3. "Where there is a continuing agency, and it is the business of the agent to disburse money to third persons on account of his principal, a bill will lie for or against such principal." [*Harper, Ch.*] *Ibid.*
4. It seems that mere complexity of accounts between parties, would give jurisdiction in Equity; but *quære*,—where the items of demand are all on one side. *Ibid.*

LIMITATION, (*Statutes of.*)

1. A son, who had lived with his father and served him, as an overseer, many years, with an understanding that his services were not to be gratuitous; but who, in consequence of intimations that he would be more than paid after the old man's death, forbore to demand compensation: was entitled, on the death of his father, who left him nothing by his will, to the value of his services out of the estate.

The son's forbearance to press his demand having occurred in consequence of the intimation that it would be satisfied after his father's death, the Statute of Limitations did not commence to run, against any part of it, 'till his father's decease. *Price vs. Price*.....167

2. Where a party, less than four years after his demand had accrued, preferred it in the form of an answer to complainants' bill, and complainants afterwards dismissed their bill, and defendant, then, immediately prosecuted his claim, but in the mean time the statutory limit had expired: *held* that it was barred by the Statute of Limitations. *Ex parte Hanks*.....203

MARRIAGE SETTLEMENT.

1. A bond, in consideration of marriage, conditioned for the payment of money to the obligor's intended wife, after his death, is a marriage settlement within the perview of A. A. 1785, and void for not being duly recorded. *Smith ex'r. vs. Patterson*.....29

MORTGAGE.

1. If a new note were given in payment of an old one secured by mortgage, the mortgage must have fallen with the note on which it was founded; but *otherwise*, where, for mere convenience a new note was executed to take the place of the old one; the object being *substitution* and not payment. *Burton vs Pressly*.....1

POSTHUMOUS CHILD. See *Devise*, 2, 4.

POWER.

1. A power to appoint by *will* is not executed by a mortgage to creditors with foreclosure and sale. *Bentham vs. Smith et al.*....33
2. Under a power to sell land, but not to warrant the title, an agreement to make titles with a clause of warranty is not valid, or binding, even to the extent of the power, upon the grantor. *Dellet et ux. vs. Whitner*... ..213
(to appoint.) See *Appointment*.

PRACTICE.

1. A copy left at the residence, is sufficient service of a subpoena, on a party domicilled in the State and temporarily absent therefrom, unless it is made to appear that he has been surprised. *Southern Steam Packet Company vs. Roger et al.*.....48
2. Defendant, while abroad, being informed by his agent that some legal paper was left for him, had such notice as ought to have put him on enquiry. It was not enough that both he and his agent had forgotten the matter before his return, and that he never saw the copy writ. But the court, in the exercise of its discretion, under the circumstance of the case, permitted him to appear and defend, on payment of costs. *Ibid.*
3. The provision, in the 23d Rule of court, "that a day shall be given the defendant to shew cause against" a decree, does not apply where he has, by his default, admitted the charges of the bill. *Ibid.*
4. Under the 35th Rule of Court, it is in the Chancellor's discretion what evidence shall be required to prove the demand of a bill taken *pro confesso*. *Ibid.*

5. After an order to account and report made, a complainant shall not, on payment of costs, have leave to dismiss his bill. *Bethea vs. McKay et al.*.....93
6. The A. A. 182i, fixing the receiver's fees, applies not only to Commissioners, but equally to all other persons appointed receivers, *Massey vs. Massey*.....159
7. The Commissioner has a sufficient warrant for paying over a wife's distributive share to the husband, (upon the joint receipt of husband and wife,) in a general order of Court to pay the parties according to their respective rights. *Geiger vs. Geiger*.....163

PRESUMPTIONS.

1. A claim preferred against administrators, for large sums alleged to have been advanced to their intestate, was rejected by the Court, on the ground of the claimant's probable inability to advancesuch amounts, the staleness of the demand, and other strong circumstances of suspicion, although sustained by absolute and unimpeached vouchers. *Ex parte Hanks*.....203
2. Where a sheriff's deputy or clerk has paid out money, on executions, it will be presumed, without proof, to have been from funds officially received by him for that purpose, and not to have been advanced from his private funds. *Ibid.*

— (By lapse of time.)

1. *Quære*,—If a man depart beyond seas and is not heard of after, whether, at the end of seven years, his death must be presumed to have occurred then, or at the time he was last heard of. *Godfrey vs. Schmidt*.....57
2. But, to quiet a title under twenty years possession, the death of one who had gone beyond seas and was never after heard of, was dated from his departure. *Ibid.*
3. The presumptions arising from twenty years possession, begin to run from the commencement of the actual possession; not, (as with the statutory limitations) from the time when a cause of action accrued to the contesting party. *Ibid.*
4. Presumption by lapse of time, against one who had been under a disability to sue, must rest on twenty years clear of the disability. But one beyond seas will not be considered as under any disability, so as to entitle him to a deduction of the seven years allowed him by law for prosecuting his suit. *Ibid.*

REMAINDER.

1. Conveyance in trust to the use of W. S. for life; after to such person as he shall appoint by will, or in default thereof, to his children. W. S. mortgaged the estate, (which was sold under a fore-closure, in his lifetime, and bought in by the creditor,) and died insolvent and intestate. The Court would not restrain the children from enforcing their claim as remainder-men. *Benham vs. Smith et al.*.....33

2. The Court will not lend its aid to bar contingent remainders, and it makes no difference that the remainder-men are the children of the tenant for life. *Ibid.*

—— See *Devise*, 4; (——Cross,) *Devise*, 5, 6.

WIFE, (separate estate.) See *Husband and Wife*, 1, 3.

WILL.

1. D. disposed of all his estate by will, and afterwards, by deed, gave all his real and personal property to "my named children in my will, and I do acknowledge this day to be them and no others then those that are named in my will, and the use ther in men-shend." This was a gift, irrevocable, of all that was covered by the will at the date of the deed; that is, of the whole estate, as then existing. *Dawson vs. Dawson*.....148
2. It was a gift, in *presenti*, to take effect at the grantor's death; but, in the mean time, a trust resulted to the grantor for his life. Therefore, after-acquired property, if purchased with the profits accruing after the date of the deed, belonged to the grantor; but otherwise, if paid for out of the *corpus*. *Ibid.*
3. The will, referred to by the deed, was thereby fixed and rendered irrevocable, so far as it became a part of the deed; but, as to the after-acquired property, its energy and revocability as a will were not effected. *Ibid.*
See *Devise*.

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